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IN THE

Supreme Court of the United States

HENRY A. ESCHENBACH, ET AL.,
Petitioners,

v.

UNITED STATES OF AMERICA,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITION FOR A WRIT OF CERTIORARI BY THE INDIVIDUAL DEFENDANTS

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QUESTIONS PRESENTED

1. Whether a criminal defendant's presumed subjective knowledge is a relevant factor for a court assessing both whether a criminal statute provides fair warning of the prohibited conduct and whether statutory ambiguity requires application of the rule of lenity.

2. Whether 18 U.S.C. § 3288, which specifically precludes re-indictment following a dismissal on statute of limitations grounds, prohibits the government from seeking a new indictment that attempts to rectify a statute of limitations violation in the initial indictment.

PARTIES TO THE PROCEEDING

Petitioners are Henry A. Eschenbach, Jack W. Wolter, William J. McCaig, Robert J. Bettacchi, O. Mario Favorito, and Robert C. Walsh, the defendant-appellees below.

Respondent is the United States of America, plaintiff-appellant below.

Defendant-appellee W.R. Grace, Inc. files its petition for certiorari separately today.

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PETITION FOR A WRIT OF CERTIORARI

Petitioners Henry A. Eschenbach, Jack W. Wolter, William J. McCaig, Robert J. Bettacchi, O. Mario Favorito, and Robert C. Walsh respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit.

OPINIONS AND JUDGMENTS BELOW

The Ninth Circuit's decision is reported at 504 F.3d 745 and reprinted in the Appendix ("App.") at 1a. The district court's relevant orders are reported at 455 F. Supp. 2d 1122 and 455 F. Supp. 2d 1113 and are reprinted at App. 45a, 66a, and 84a, respectively.

JURISDICTION

The Ninth Circuit rendered its decision on September 20, 2007, 504 F.3d 745, and, on December 5, 2007, denied timely petitions for rehearing *en banc*. App. 43a. On February 14, 2008, Justice Kennedy granted petitioners' application to extend the time in which to petition this Court for certiorari until April 14, 2008. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

The criminal provisions of the Clean Air Act provide in relevant part:

> Any person who knowingly releases into the ambient air any hazardous air pollutant listed pursuant to section 7412 of this title . . . and who knows at the

> time that he thereby places another person in imminent danger of death or serious bodily injury shall, upon conviction, be punished by a fine under Title 18, or by imprisonment of not more than 15 years, or both. Any person committing such violation which is an organization shall, upon conviction under this paragraph, be subject to a fine of not more than $1,000,000 for each violation.

42 U.S.C. § 7413(c)(5)(A).

The civil provisions of the Clean Air Act provide in relevant part:

> (b) List of pollutants
>
> (1) Initial list
>
> The Congress establishes for purposes of this section a list of hazardous air pollutants as follows:
>
> | CAS number | Chemical name |
> |---|---|
> | * * * | |
> | 1332214 | Asbestos |
> | * * * | |
>
> (c) List of source categories
>
> (1) In general
>
> Not later than 12 months after November 15, 1990, the Administrator shall publish, and shall from time to time, but no less often than every 8 years, revise, if appropriate, in response

to public comment or new information, a list of all categories and subcategories of major sources and area sources (listed under paragraph (3)) of the air pollutants listed pursuant to subsection (b) of this section. . . .

(2) Requirement for emissions standards

For the categories and subcategories the Administrator lists, the Administrator shall establish emissions standards under subsection (d) of this section, according to the schedule in this subsection and subsection (e) of this section.

(3) Area sources

The Administrator shall list under this subsection each category or subcategory of area sources which the Administrator finds presents a threat of adverse effects to human health or the environment (by such sources individually or in the aggregate) warranting regulation under this section. The Administrator shall, not later than 5 years after November 15, 1990, and pursuant to subsection (k)(3)(B) of this section, list, based on actual or estimated aggregate emissions of a listed pollutant or pollutants, sufficient categories or subcategories of area sources to ensure that area sources representing 90 percent of the area source emissions of the 30 hazardous air pollutants that present the greatest

> threat to public health in the largest number of urban areas are subject to regulation under this section. Such regulations shall be promulgated not later than 10 years after November 15, 1990.

42 U.S.C. § 7412.

The EPA has defined "Asbestos" within the meaning of § 7214(b) as follows:

> Asbestos means the asbestiform varieties of serpentinite (chrysotile), riebeckite (crocidolite), cummingtonite-grunerite, anthophyllite, and actinolite-tremolite.

40 C.F.R. § 61.141.

18 U.S.C. § 3288 provides:

> Whenever an indictment or information charging a felony is dismissed for any reason after the period prescribed by the applicable statute of limitations has expired, a new indictment may be returned in the appropriate jurisdiction within six calendar months of the date of the dismissal of the indictment or information, or, in the event of an appeal, within 60 days of the date the dismissal of the indictment or information becomes final, or, if no regular grand jury is in session in the appropriate jurisdiction when the indictment or information is dismissed, within six calendar months of the date

when the next regular grand jury is convened, which new indictment shall not be barred by any statute of limitations. This section does not permit the filing of a new indictment or information where the reason for the dismissal was the failure to file the indictment or information within the period prescribed by the applicable statute of limitations, or some other reason that would bar a new prosecution.

INTRODUCTION

In this criminal prosecution, the government has attempted to change settled rules to advance its case, and the Ninth Circuit has departed from precedent and logic to accommodate the government's efforts. The individual petitioners respectfully submit this separate petition to underscore two troubling aspects of the Ninth Circuit's opinion that apply with particular force to each of them.

I. The Ninth Circuit's decision ignores the settled statutory definition of "asbestos" that has been accepted by all federal agencies for more than 30 years. In reaching that decision, the Ninth Circuit applied canons of statutory interpretation that diverge sharply from the precedents of this Court and every other federal court of appeals. In so doing, the Ninth Circuit deemed its novel definition clear and refused to apply the rule of lenity, not on the basis of statutory text and related guidance, but on account of its own sweeping assumptions regarding

petitioners' subjective understanding of a scientific term in the statute.

Since 1971, all federal agencies have agreed that the definition of "asbestos" under the civil provisions of the Clean Air Act ("CAA") includes six minerals. Until this case, it has been universally accepted that the CAA's criminal provisions applied the same definition. But to advance this criminal prosecution, the government claimed for the first time that the CAA's criminal provisions provide a broader and more open-ended definition of asbestos than the one applicable under the statute's civil provisions. This proposed definition reaches two substances—richterite and winchite—never previously regulated as asbestos under the CAA.

The Ninth Circuit endorsed the government's newly minted definition and, in construing an ambiguous statute and addressing the due process-based principles of fair warning and the rule of lenity, explicitly considered the supposed *subjective* knowledge of petitioners. To make matters worse, the Ninth Circuit made and relied on assumptions regarding the petitioners' knowledge and intent on a record devoid of evidence.

For the reasons explained in petition filed by W. R. Grace & Co. ("Grace"), the Ninth Circuit's reading of the CAA was wrong, and that error threatens a range of real world consequences requiring this Court's immediate review. The Ninth Circuit's vague and unfettered definition of "asbestos" appears to include such common minerals as talc and to exclude crocidolite, which is one of the six regulated asbestos minerals (and the one often

regarded as the most harmful). Although it represents a new and one-sided split, the Ninth Circuit's mode of statutory analysis and ultimate definition of "asbestos" under the criminal provisions of the CAA require this Court's prompt review to avoid broad consequences beyond this prosecution.

In holding that its novel definition of "asbestos" was so clear that the petitioners had fair notice of the criminality of their alleged conduct and that there was no need to apply the rule of lenity, the Ninth Circuit relied on its unsupported view of the petitioners' subjective knowledge of industrial chemicals. App. 17a-18a. Not only had the district court received no evidence on this point, but the government agency charged with interpreting and enforcing the CAA had long employed a definition of "asbestos" markedly different from the Ninth Circuit's. For more than 30 years, Congress, EPA, and other federal agencies had enunciated a single definition of "asbestos" that excluded richterite and winchite, the two minerals that comprise 95% of the material whose alleged "release" forms the principal basis for the CAA charges in this case.

Under the Due Process Clause, a criminal statute must provide clear notice of the conduct that it proscribes in language that the common person can understand. To implement this constitutional guarantee, courts have uniformly held that criminal statutes must provide, in language aimed at the *reasonable* person, clear notice of the conduct the statute prohibits and the consequences of violation. This Court has explicitly rejected using a defendant's subjective knowledge to determine a criminal statute's scope, *Bouie v. City of Columbia*, 378 U.S.

347, 348-49 (1964). Consistent with that decision, every other federal court of appeals has made clear that a statute must put an *objective* reader on notice of what is criminal. The Ninth Circuit's departure from this basic rule places criminal defendants within the circuit on a different footing than those throughout the rest of the country. The Ninth Circuit compounded this error by assessing this irrelevant aspect of the petitioners' knowledge on an empty record. By granting review and bringing the Ninth Circuit in line before trial, this Court will preserve judicial economy and reduce the burden of trial on the individual petitioners, all of whom are over 65 years of age and have been under indictment since 2005.

II. This Court should also grant certiorari to correct the Ninth Circuit's fundamental misreading of 18 U.S.C. § 3288, which precludes the government from seeking a superseding indictment when the original indictment was dismissed on statute-of-limitations grounds. The Ninth Circuit has read out of the statute this critical protection and provided the government with a means of avoiding statutes of limitations. In the Ninth Circuit, the government may now bring an untimely indictment, suffer dismissal on that ground, and then use the six-month grace period afforded by § 3288 to resuscitate the time-barred prosecution through a superseding indictment. Because this aspect of the Ninth Circuit's decision denies criminal defendants an essential protection against untimely prosecutions, it is unprecedented and fundamentally wrong.

For these reasons and those set forth in Grace's petition, this Court should grant certiorari and reverse the decisions below.

STATEMENT OF THE CASE

A. Factual and Regulatory Background

This case arises from Grace's operation of a vermiculite mine in Libby, Montana, from 1963 to 1990. Vermiculite, a mineral that resembles mica and that expands when heated, is not ordinarily hazardous itself. However, the vermiculite ore deposit in Libby contains naturally occurring mineral impurities, including primarily winchite, richterite, and tremolite. The government describes this combination of mineral impurities as "Libby amphibole." App. 46a. An analysis of "Libby amphibole" by the United States Geological Survey concluded that, "approximately 84% of the amphiboles can be classified as winchite, 11% as richterite, and 6% as tremolite."[1] *See* App. 47a.

When Congress amended the CAA in 1970 to regulate hazardous air pollutants, it directed the Environmental Protection Agency ("EPA") to identify "hazardous air pollutants" and to promulgate emissions standards for them. *See* Clean Air Act Amendments of 1970, Pub. L. No. 91-604, § 4(a) 84 Stat. 1676, 1685 (1970). In 1971, the EPA issued a proposed rule that established "asbestos" as a hazardous air pollutant and defined it as "actinolite,

[1] Although these numbers amount to 101%, the district court properly quoted from a supplemental expert witness disclosure; it appears that the underlying arithmetic error arises from an issue of rounding.

amosite, anthophyllite, chrysotile, crocidolite, tremolite." 36 Fed. Reg. 23,239, 23,242 (Dec. 7, 1971) (to be codified 40 C.F.R. pt. 61). The final rule adopting that definition was promulgated in 1973. 38 Fed. Reg. 8,829 (Apr. 6, 1973) (codified at 40 C.F.R. § 61.21). That six-mineral definition, currently codified at 40 C.F.R. § 61.141, has remained essentially unchanged since 1973 and has been adopted by OSHA, MSHA, the CSPC, and even Congress itself.[2] This definition has stood for 35 years as the sole federal regulatory definition of "asbestos."[3] Of particular importance in this case, that definition has never included the minerals richterite or winchite, which comprise approximately 95% of "Libby amphibole."

In 1990, Congress amended the CAA in significant respects. For the first time, Congress specifically identified a list of 189 substances as "hazardous air pollutants" including "asbestos"—but not richterite or winchite. Clean Air Act Amendments of 1990, Pub. L. No. 101-549, Title III, § 301, 104 Stat. 2399, 2532 *codified at* 42 U.S.C. § 7412(b). Again, Congress did not create a specific statutory definition of "asbestos" or any of the other listed pollutants; rather, it directed that EPA's previously promulgated standards were to remain in

[2] *See* 29 C.F.R. § 1910.1001(b) (adopted by OSHA); 30 C.F.R. § 71.702(a) (adopted by MSHA); 16 C.F.R. § 1304.3(b) (adopted by CPSC); and 40 C.F.R. § 763.163 (adopted by EPA). Congress similarly defined "asbestos" in the Asbestos Hazard and Emergency Response Act ("AHERA"), 15 U.S.C. § 2642(3), enacted in 1986.

[3] Currently, EPA's website uses the six-mineral definition for its publication "What is Asbestos?" http://www.epa.gov/oppt/asbestos/pubs/asbe.pdf.

effect. *See id.*, 104 Stat. 2399, 2562, *codified at* 42 U.S.C. § 7412(q).

Section 7412 itself provides no definition of "asbestos," but contains a reference to a Chemical Abstracts Service ("CAS") registry number. The CAS registry is a private database maintained by the American Chemical Society, a private entity. The CAS database, which can be accessed only by paid subscribers, lists particular minerals or mineral groups, defines their characteristics, and assigns each a unique number. App. 58a-59a, 61a. The CAS registry assigns "Asbestos" the number 1332-21-4 and provides the following definition: "A grayish, noncombustible fibrous material. It consists primarily of impure magnesium silicate minerals." App. 59a For each of the six minerals in the EPA's definition of asbestos, the CAS entry lists the term "asbestos" in at least one information field. *Id.* In contrast, the CAS entries for richterite and winchite contain no references to asbestos. App. 60a.

Also in the 1990 amendments, Congress revised and supplemented the CAA's criminal provisions. Specifically, Congress made it a crime for any party to "knowingly release[] into the ambient air any hazardous air pollutant listed pursuant to" 42 U.S.C. § 7413(b) while "know[ing] at the time that he thereby places another person in imminent danger of death or serious bodily injury . . . ." *Id.*, Title VII, § 701, 104 Stat. 2399, 2676 *codified at* 42 U.S.C. § 7413(c)(5)(A). The maximum sentence for a violation of the "knowing endangerment" provision of the CAA is 15 years imprisonment. *Id.*

There have been no pertinent changes to the underlying civil regulations in well over a decade, despite discussions, proposed rule-makings, and congressional hearings on the issue. Notably, in 2001, Kathleen Rest, the Acting Director of the National Institute for Occupational Safety and Health's ("NIOSH") Center for Disease Control and Prevention, testified before the United States Senate that "80 to 90% . . . of the fiber contaminant in this [Libby] vermiculite has been characterized as several other similar fibers that are not currently regulated as asbestos, such as winchite and richterite." Defs.' Joint Mot. in Limine on Evid. on non-"Asbestos" Minerals, Ex. I, Doc. No. CR-05-07-M-DWN (D. Mont. May 31, 2006) (Docket Entry No. 474). Similarly, in Comments to the Mine Safety and Health Administration ("MSHA") on a Proposed Rule on Asbestos Exposure Limit, NIOSH agreed with MSHA's decision not to modify the definition of asbestos at that time. Comments of NIOSH on the MSHA Proposed Rule on Asbestos Exposure Limits, 2 (Oct. 13, 2005), *available at* http://198.246.98.21/niosh/review/public/099/pdfs/Asbestos-msha_final%202005_proposed%20rule.pdf. In doing so, NIOSH noted that the "regulatory definition of asbestos should include asbestiform mineral fibers such as winchite and richterite," but acknowledged that the existing definition of asbestos did not do so. *Id.*

B. Proceedings Below

1. In February 2005, a federal grand jury in the District of Montana returned a ten-count indictment charging Grace and seven former employees with,

among other offenses, (a) violating the criminal "knowing endangerment" provision of the CAA, 42 U.S.C. § 7413(c)(5)(A), and (b) conspiring over a 26-year period to: (1) knowingly endanger others by releasing asbestos into the ambient air, in violation of the CAA; and (2) defrauding the government in violation of 18 U.S.C. § 371 by concealing information about the hazards of asbestos and impeding the EPA's efforts to address asbestos contamination in Libby. App. 122a. Under a tolling agreement between petitioners and the government, acts that occurred before November 3, 1999 are time-barred.

2. Petitioners moved to dismiss the knowing endangerment object of the conspiracy count as time-barred because the law requires that the statute of limitations must be satisfied independently for each object when the government charges a defendant with a conspiracy having multiple objects. Petitioners argued that the indictment failed to allege any overt acts that were both within the statute of limitations and in furtherance of the endangerment object. The district court agreed and dismissed the knowing endangerment object "as time-barred." App. 103a.

3. The government did not appeal from this decision. Instead, on June 26, 2006, the government obtained an eight-count Superseding Indictment. The new indictment reiterated the charge of conspiracy to defraud and to knowingly endanger, as well as substantive violations of the CAA. App. 104a-154a.

The superseding indictment is largely identical to the original indictment,[4] with one notable exception. The government rewrote the conspiracy count to allege that post-November 3, 1999 conduct not only furthered the conspiracy to defraud but also caused releases of asbestos, thereby furthering the endangerment conspiracy. The conduct described in the new allegations occurred more than five years before the filing date of superseding indictment was filed (June 26, 2006), making the knowing endangerment object untimely on its face.

4. The district court granted petitioners' subsequent motion to dismiss the endangerment conspiracy, holding that, like its counterpart in the original indictment, this charge was barred by the applicable statute of limitations. App. 83a. The district court cited its prior holding that "the reason for the dismissal" of the knowing endangerment object in the first indictment was because it was "time-barred," as well as the text of 18 U.S.C. § 3288, which states that the government may not re-indict "where the reason for the dismissal was the failure to file the indictment or information within the period prescribed by the applicable statute of limitations, or some other reason that would bar a new prosecution." App. 78a. The government then filed this interlocutory appeal.

[4] As in the original indictment, petitioners Grace, Wolter, and Bettacchi, and defendant Alan Stringer were charged in the superseding indictment with substantive violations and with conspiracy to violate the Clean Air Act, while petitioners Eschenbach, Walsh, McCaig, and Favorito were included only in the conspiracy charge. App. 122a, 154a-158a. Mr. Stringer died while the indictment was pending and has been dismissed from the case.

5. In the district court, petitioners also challenged the government's attempt to introduce evidence of allegedly hazardous releases based on mineral samples composed principally of two materials that had never previously been defined as "asbestos" under the CAA.

The counts charging substantive violations of the CAA's "knowing endangerment" provision allege that petitioners knowingly released or caused the release of "asbestos" into the ambient air, thereby placing certain inhabitants of Libby in imminent danger of death or serious bodily injury. App. 149a-151a. The Superseding Indictment does not distinguish among the mineral impurities found in Libby vermiculite ore but instead refers to them collectively as "Libby amphibole," which is described as asbestos "composed of a family of closely related minerals including tremolite, winchite, richterite, actinolite and others." App. 105a.

Petitioners moved *in limine* to exclude expert testimony based on mineral samples that contained an undifferentiated mixture of minerals, some of which are defined as "asbestos" under the CAA and some of which are not. Petitioners argued that the definition of "asbestos" for purposes of the criminal provisions of the CAA derives from the familiar and longstanding six-mineral definition that Congress cross-referenced from the EPA's civil regulations, which do not include winchite or richterite. *See* App. 47a. Petitioners claimed that construing the term to include winchite and richterite would deny them fair notice, and that the rule of lenity required the resolution of any ambiguity in their favor. App. 46a-47a.

Petitioners further argued that government agency's own interpretations of the definition of asbestos excluded winchite and richterite. For example, in a March 2001 e-mail, Susan Kess of the Agency for Toxic Substance and Disease Registry explained that Chris Weis of EPA had settled on the term "Libby amphibole" because "[i]f we call it asbestos then the lawyers can say it is not one of the 6 regulated asbestos types." Defs.' Joint Mot. in Limine on Evid. on non-"Asbestos" Minerals, Ex. H, Doc. No. CR-05-07-M-DWN (D. Mont. May 31, 2006) (Docket Entry No. 474). Similarly, in a May 2003 internal EPA document entitled *Q's & A's for Asbestos and Vermiculite*, the agency stated that "[m]ost of the fibrous materials which contaminated the Libby vermiculite are not included in the federal definition of regulated asbestos." *Id.* at Ex. L.

The government argued that the word "asbestos," supplemented by the CAS registry definition of that term, was a sufficient definition for purposes of the criminal provisions. App. 61a. The government further claimed that the regulatory definition of asbestos promulgated under § 7412(b) was inapplicable because the Libby mine was not a regulated source of emissions. App. 58a-59a.

The district court rejected these arguments, finding that the language in the CAA was ambiguous and did not provide fair notice as to which minerals were "asbestos" within the meaning of the statute. App. 57a-58a. The district court noted that the CAA's knowing endangerment provision "sends an actor in two different directions in search of the hazardous air pollutant asbestos." App. 62a. Explicitly applying an objective standard, the court

found that a "*reasonable* person who searches both the CAS registry and the NESHAPs regulations could fairly conclude that winchite and richterite are not covered by § 7412(b)(1); neither the statute, the regulations, or the CAS registry explicitly includes those materials in the definition of 'asbestos.'" *Id.* (emphasis added). The district court then applied the rule of lenity, strictly construed the criminal statute in favor of the defendants, and resolved the statutory ambiguity by applying the civil regulations' six-mineral definition of "asbestos." App. 63a. Based on this definition, the district court excluded as irrelevant evidence of minerals not included in EPA's regulatory definition.

Because much of the government's evidence and surveys simply referred to "Libby amphibole," the district court likewise excluded sampling data or other evidence that did not distinguish among the minerals. App. 63a-64a. As the district court explained, the risk of unfair prejudice to petitioners would be "intolerable" if the government were allowed to elicit testimony that petitioners "endangered others through the release of a deadly composite of minerals without stating with any certainty what percentage of the minerals released are covered by the criminal statute under which [petitioners] are charged." App. 64a.

The district court entered its order on August 8, 2006, approximately one month before trial was scheduled to begin. The government filed this interlocutory appeal of that order and several other pretrial orders August 23, 2006. The district court stayed the trial pending the resolution of both this

appeal and a prior interlocutory appeal by the government.

6. On September 20, 2007, in an opinion by Judge Betty Fletcher, joined by Judges Pregerson and Ferguson, the Ninth Circuit rejected the district court's interpretation of both the CAA and § 3288. App. 42a.

With respect to the CAA interpretation, without citing even a dictionary definition, the Ninth Circuit held that it is "well known" that "asbestos has a common meaning; it is a fibrous, non-combustible compound that can be composed of several substances, typically including magnesium." App. 16a-17a. Citing the CAS registry, the court also noted that asbestos may be defined as a "grayish non-combustible material" that "consists primarily of impure magnesium silicates." App. 17a. The court also remarked, without any evidence having been presented in the case, that "defendants had actual notice in this case of the risks from the fibrous content of the asbestiform minerals in their products" and that "[s]ince at least 1976, defendants have known of the health risks posed by asbestiform minerals in their products. It is clear that defendants knew or should have known that their mining, milling, and distribution activities risked the release of asbestos into the ambient air." *Id.* The Ninth Circuit determined in light of "defendants' knowledge of the industrial chemicals field" that the definition of asbestos was clear, and petitioners had fair notice that the definition included richterite and winchite. As a result, the Ninth Circuit concluded that the district court's

interpretation of the statute and invocation of the rule of lenity was misplaced. App. 18a.

The Ninth Circuit also reversed the district court's holding that the government's effort to file a superseding indictment concerning the knowing endangerment object of the conspiracy count was impermissible under § 3288. App. 13a. The panel perceived the statute to incorporate a distinction between charges that are "not timely filed" and those that are merely "time-barred." In its view, re-indictment is prohibited when the initial indictment was "not timely filed, *i.e.* [] not filed within the statute of limitations," *id.*, but permitted when—as happened here—the district court rules that the indictment fails to allege an act sufficient to trigger the running of the statute of limitations within the applicable limitations period. Despite contrary language in the district court's order, the panel construed that order, which dismissed the first indictment as a finding that the indictment was "timely filed." In the Ninth Circuit's view, the faulty endangerment conspiracy count was merely "time-barred" because it failed to allege an overt act within the statute of limitations. Hence, the panel held, re-indictment of that count was proper. *Id.*

REASONS FOR GRANTING THE WRIT

I. The Ninth Circuit Departed From This Court's Settled Precedent By Erroneously Using A Defendant's Subjective Knowledge In Assessing Whether An Ambiguous Statute Provides Fair Notice And Whether The Rule of Lenity Should Apply

Grace's petition sets forth in detail the significant errors of law and logic that pervade the Ninth Circuit's decision. Disregarding the district court's careful analysis, the Ninth Circuit erred in concluding that the term "asbestos" has a different—and broader—meaning in the criminal provisions of the CAA than it does in the civil provisions. The profound and far-reaching consequences of that erroneous decision alone merit this Court's immediate review. The individual petitioners write separately to emphasize that the Ninth Circuit's mode of statutory interpretation represents a dramatic departure from the precedents of this Court and other federal courts of appeals. The Ninth Circuit's consideration of a defendant's subjective knowledge when assessing whether an ambiguous statute provides fair notice to a common person sets it apart from every court in the country and calls for prompt reversal. By making assumptions about that knowledge on an empty record, the Ninth Circuit placed its approach even farther outside the judicial mainstream.

A. The Ninth Circuit's Application of the Fair Notice Doctrine and the Rule of Lenity Conflicts With This Court's Established Precedents

The Due Process Clause requires that criminal statutes place the public on "fair warning" that certain conduct is proscribed and punishable by law—"no man shall be held criminally responsible for conduct which he could not reasonably understand to be proscribed." *Bouie v. City of Columbia*, 378 U.S. 347, 351 (1964). The "fair

warning" requirement includes three related doctrines: vagueness, lenity, and judicial restraint. *United States v. Lanier*, 520 U.S. 259, 266-67 (1997). Under each doctrine, the analysis turns on "whether the statute, either standing alone or as construed, made it *reasonably* clear at the relevant time that the defendant's conduct was criminal." *Id.* at 267 (emphasis added).

The three manifestations of fair warning—vagueness, lenity, and judicial restraint—are rooted in the perspective of the common person. The vagueness doctrine prohibits enforcement of "a statute which either forbids or requires the doing of an act in terms so vague that *men of common intelligence* must necessarily guess at its meaning and differ as to its application." *Lanier*, 520 U.S. at 266 (quoting *Connally v. Gen. Constr. Co.*, 269 U.S. 385, 391 (1926)) (emphasis added). The rule of lenity "ensures fair warning by so resolving ambiguity in a criminal statute as to apply it only to conduct clearly covered." *Id.* at 266. And judicial restraint "bars courts from applying a novel construction of a criminal statute to conduct that neither the statute nor any prior judicial decision has fairly disclosed to be within its scope." *Id.* Each of these doctrines shares the goal of providing fair notice to the general public; none takes into account a defendant's subjective knowledge. This Court has previously recognized the rule of lenity's applicability to other criminal provisions of the CAA. *See Adamo Wrecking Co. v. United States*, 434 U.S. 275, 284-85 (1978).

The Ninth Circuit's decision runs afoul of all three fair warning doctrines. The court did not

consider whether the statute provides fair notice of the proscribed conduct to "men of common intelligence" or whether the CAA provides fair warning "to the world in language that the common world will understand, of what the law intends to do if a certain line is passed." *McBoyle v. United States*, 283 U.S. 25, 27 (1931) (Holmes, J.). Rather, it focused on the subjective, individual knowledge of the petitioners, and, in so doing, assumed as fact allegations made by the government. Due process prohibits such an approach.

This Court has never held that a defendant's actual knowledge, much less an unsupported assumption regarding that knowledge, can obviate the need to apply the rule of lenity to an ambiguous criminal statute. Indeed, it has held exactly the opposite. In *Bouie v. City of Columbia*, this Court addressed the application of a criminal trespass statute to lunch counter sit-in protests in Columbia, South Carolina. 378 U.S. at 348-49. The state argued that the defendants knew their conduct was unlawful as evidenced by their testimony that they intended to be arrested. This Court disagreed, declaring that testimony "irrelevant." *Id.* at 355 n.5. This Court specifically rejected the analysis applied by the Ninth Circuit in this case: "The determination whether a criminal statute provides fair warning of its prohibitions must be made on the basis of the statute itself and the other pertinent law, rather than on the basis of an ad hoc appraisal of the subjective expectations of particular defendants." *Id.* This Court held that the South Carolina statute did not provide fair warning to the defendants that their conduct would be criminal. *Id.* at 355.

In *United States v. Lanier*, 520 U.S. 259 (1997), this Court reaffirmed the objective approach set forth in *Bouie*. In *Lanier*, the Court reviewed the conviction of a state judge found guilty under 18 U.S.C. § 242[5] of acting under color of state law to deprive several women of their constitutional rights by sexually assaulting them. This Court considered whether that statute provided fair notice of the conduct it makes criminal. Section 242 does not specify the predicate constitutional rights but incorporates constitutional law by reference, giving the law a broad scope. *Lanier*, 520 U.S. at 265. This Court found unanimously that the statute provided fair warning, noting that its analysis parallels the civil qualified immunity doctrine, which requires that a constitutional right to be "clearly established." *Id.* at 270. Under either standard—"clearly established" in the civil context or "fair warning" in the criminal—an official will be held liable only when "the contours of the right [violated are] sufficiently clear that a *reasonable official* would understand that what he is doing violates that right." *Id.* (quoting *Anderson v. Creighton*, 483 U.S. 635, 640 (1987)) (emphasis added) (internal quotation marks omitted). The issue was not whether Judge Lanier knew that the right in question was clearly established, but whether a

[5] 18 U.S.C. § 242 provides, in pertinent part, "Whoever, under color of any law, statute, ordinance, regulation, or custom, willfully subjects any person in any State, Territory, Commonwealth, Possession, or District to the deprivation of any rights, privileges, or immunities secured or protected by the Constitution or laws of the United States . . . shall be fined under this title or imprisoned not more than one year, or both . . . ."

reasonable person would have known that he was violating a constitutionally protected right.

Indeed, neither this Court nor the courts below considered whether, as a judge, Lanier had special familiarity with constitutional law such that a different standard of criminal liability should apply to him, as opposed to a police officer, a prison warden, or some other official. This failure to consider that information, even if it had been established, was appropriate because the standard of fair warning that applies to all criminal statutes is simply "whether the statute, either standing alone or as construed, made it reasonably clear at the relevant time that the defendant's conduct was criminal." *Lanier*, 520 U.S. at 267.

The Ninth Circuit abandoned the long-established principles of fair warning and lenity in favor of an analysis that, by employing a subjective, individualized standard of notice, turns both concepts upside-down. The court cited no authority for its decision other than its assessment of the individuals' presumed knowledge of industrial chemicals and the hazards of "asbestos" generally.

The panel determined that the petitioners' supposed knowledge of industrial chemicals, App. 17a, and their purported understanding of the dangerousness of asbestos, *id.*, somehow put them on notice that minerals not defined as "asbestos" by EPA regulations would nevertheless be subject to criminal sanction. The panel stated, as a matter of law, that "[a]sbestos is adequately defined as a term and need not include mineral-by-mineral classifications to provide notice of its hazardous

nature, *particularly to these knowledgeable defendants*." App. 19a-20a (emphasis added).

Although (or perhaps, because) the Ninth Circuit addressed the issue before the presentation of any evidence, at trial or otherwise, the court relied on its own unsupported belief to rationalize its ruling. The court divined that petitioners "are all familiar with asbestos" and that "[s]ince at least 1976, defendants have known of the health risks posed by the asbestiform minerals in their products." App.17a. Remarkably, the court asserted, before empanelling a jury and without testimony from even one witness, that "defendants knew or should have known that their mining, milling, and distribution activities risked the release of asbestos in the ambient air" and that their "knowledge of the industrial chemicals field" should have precluded the application of the rule of lenity by the district court. *Id.*

Besides lacking any evidentiary basis, the Ninth Circuit's views of petitioners' supposed knowledge of the dangers of asbestos were irrelevant. Knowledge that asbestos can pose dangers to human health is not equivalent to knowledge that the statutory definition of "asbestos" includes substances never previously included in statutory and regulatory definitions of that term. Whatever petitioners knew about the dangers of asbestos as a general matter—and the record is silent on that issue—there is nothing to suggest that they had reason to know that the CAA's definition of asbestos encompassed richterite and winchite, two substances that the

EPA, other regulatory agencies, and even the CAS registry had never defined as "asbestos."[6]

In short, the Ninth Circuit's speculation about the petitioners' subjective knowledge had no place in a proper analysis of whether the government's proposed reading of the statute provided fair warning or of whether the statute was ambiguous and therefore required resort to the rule of lenity. In surmising, based on an empty record, not only what petitioners knew but also that because of this knowledge petitioners had fair notice that the CAA proscribed their alleged conduct, the Ninth Circuit construed the criminal provisions of the CAA in a manner that runs counter to this Court's established precedent. That approach should be reversed.

B. The Ninth Circuit's Approach Conflicts With Decisions Of Other Courts of Appeals

[6] As more fully explained in Grace's petition, the Ninth Circuit's definition of "asbestos" is seriously flawed. The first part of the definition—"a fibrous, non-combustible compound that can be composed of several substances, typically including magnesium"—is overbroad and includes such common materials as talc ($Mg_3Si_4O_{10}(OH)_2$). The second part of the definition, joined with a disjunctive "or" is also problematic, because a "grayish non-combustible material" that "consists primarily of impure magnesium silicates" necessarily excludes winchite and established forms of "asbestos" like crocidolite, both of which are blue. *See* Mark Germine & John Puffer, Abstract, Winchite and Crocidolite Asbestos in a Historical Sample of the Libby, Montana Vermiculite Product, presented at the 2001 Asbestos Health Effects Conference (May 25, 2001) (*available at* http://www.epa.gov/oswer/ahec/summary/abstracts/germine2.pdf).

The Ninth Circuit's subjective fair warning analysis puts it at odds with the approach applied by every other court of appeals to address the issue of fair warning. This Court should reverse to bring the Ninth Circuit back in line with the other courts of appeals.

In *United States v. Introcaso*, 506 F.3d 260, 269-70 (3d Cir. 2007), *cert. denied*, 128 S. Ct. 1324 (2008), the Third Circuit used objective principles to determine whether a firearm owner violated the Firearms Act by failing to register an antique shotgun. The court reversed the defendant's conviction on the grounds that Congress did not define the term "antique" with enough specificity to put a reasonable person on notice regarding the exemptions from the registration requirements. The defendant in *Introcaso* owned twenty-eight other registered firearms. *Id.* at 263. Unlike the Ninth Circuit, the Third Circuit ignored the defendant's subjective knowledge and based its decision on what a common person would find in the statutory text.

Similarly, the Eleventh Circuit has explicitly held that in a fair warning analysis, the court must determine whether an ordinary person could look at the statute and determine the conduct prohibited. *United States v. Fisher*, 289 F.3d 1329, 1336 (11th Cir. 2002). The defendant in *Fisher* was charged with violating the Analogue Act, 21 U.S.C. § 813, which prohibits the sale of precursors and analogues to controlled substances. Fisher, the owner and operator of a bodybuilding gym, sold a drink containing a drug called GBL, which upon ingestion was metabolized into GHB, a controlled substance. *Fisher*, 289 F.3d at 1331-32. Fisher argued that the

Act did not give him fair warning that GBL was an analogue of GHB. *Id.* at 1336. The Eleventh Circuit analyzed the Act and held that the public was on notice that GHB and its analogues were controlled substances. *Id.* The court determined that "[t]he next step in this constitutional analysis is to decide whether an *ordinary person* could look at the definition of controlled substance analogue and determine that GBL is an analogue of GHB." *Id.* (emphasis added). The court, ignoring Fisher's own subjective knowledge, then found that "[p]eople of ordinary intelligence would easily be able to determine that a substance, which is converted upon ingestion into a metabolite . . . would meet the definition of a controlled substance analogue." *Id.* at 1339. Nowhere in its inquiry did the Eleventh Circuit consider whether a "knowledgeable defendant" would have been on notice; the court's inquiry was based on objective criteria.

In *United States v. Councilman*, 418 F.3d 67 (1st Cir. 2005) (en banc), the First Circuit used similar objective principles in addressing a fair warning challenge to the Wiretap Act, 18 U.S.C. §§ 2510-2522. The defendant, who ran a rare-book listing service and provided book dealers with e-mail service, was charged with violating the Wiretap Act by diverting a copy of all e-mails sent through his server from Amazon.com, another online seller of books. *Id.* at 70. At issue was whether the Wiretap Act's prohibition of "intentionally intercept[ing], endeavor[ing] to intercept, or procure[ing] any other person to intercept or endeavor to intercept, any wire, oral, or electronic communication" gave fair warning as to what conduct was prohibited. *Id.* at

72; *see* 18 U.S.C. § 2511. The defendant argued that "electronic communication" and "intercept" were too ambiguous to provide fair warning as to when his conduct as a service provider would be criminal. A majority of the *en banc* panel disagreed and held that, "[f]rom its text, a person of average intelligence would, at the very least, be on notice that '[e]xcept as otherwise specifically provided in' the Act, 'electronic communication[s],' which are defined expansively, may not be 'intercepted.'" *Councilman*, 418 F.3d at 84. Although the dissent disagreed with the result, it, too, applied an objective standard, stating, "Councilman is being held to a level of knowledge which would not be expected of any of the judges who have dealt with this problem, to say nothing of 'men [and women] of common intelligence.' *Id.* at 90 (Torruella, J., dissenting) (quoting *Lanier*, 520 U.S. at 266).

Other Circuits have taken the same approach to such challenges. *See, e.g., United States v. Cullen*, 499 F.3d 157, 159-60 (2d Cir. 2007) (holding that the phrase "personal pet" in the Wild Bird Conservation Act, 16 U.S.C. § 4901 *et seq.*, provided fair warning for the objective person to know the Act's exemptions); *United States v. Lund*, 853 F.2d 242, 244-245 (4th Cir. 1988) (determining, without regard to defendant's subjective knowledge, that "application" and "contract" are "common words with well-established meanings that are more than adequate to give persons of ordinary intelligence fair notice of the conduct proscribed by the statute."); *United States v. Kay*, 513 F.3d 432, 441-42 (5th Cir. 2007) (affirming conviction under Foreign Corrupt Practices Act because the Act's "obtaining or

retaining" business nexus requirement gave objective notice that payments to foreign officials for preferential tax benefits were proscribed); *United States v. Blaszak*, 349 F.3d 881, 885-87 (6th Cir. 2003) (finding statute clearly prohibited conduct and that statute's "meaning should be clear to a person of common intelligence because it is neither overly technical nor obscure."); *United States v. Lim*, 444 F.3d 910, 915-16 (7th Cir. 2006) (affirming conviction for failure to register under Firearm Act notwithstanding statute's lack of guidance as to how to measure the gun barrel or overall length because reasonable persons would understand those terms and implementing regulations explained the terms), *cert. denied*, 127 S. Ct. 239 (2008); *United States v. Carpenter*, 422 F.3d 738, 746 (8th Cir. 2005) (holding phrase "harm to human life" provided sufficient notice to person of common intelligence for fair warning); *United States v. Michel*, 446 F.3d 1122, 1135 (10th Cir. 2006) (affirming conviction under Armed Career Criminal Act, 18 U.S.C. § 924, because statute's "separateness" element "set out in terms that the ordinary person exercising ordinary common sense can sufficiently understand and comply with, without sacrifice to the public interest") (quotation omitted); *United States v. West*, 393 F.3d 1302, 1311-12 (D.C. Cir. 2005) (assessing meaning of criminal statute informed by doctrine that fair warning be given in "language that the common world will understand" and that "legislatures, not courts" define criminal activity) (quotation omitted).

The Ninth Circuit's decision runs counter to the approach applied by every other circuit. This Court should grant certiorari to address this divergence.

II. Certiorari Is Also Warranted To Correct The Ninth Circuit's Erroneous Interpretation of 18 U.S.C. § 3288

This Court should also grant certiorari because the Ninth Circuit's decision opens a substantial hole in criminal statutes of limitations, denying criminal defendants critical protection against untimely prosecutions. Under the court of appeals' misreading of the plain text of § 3288, the government may bring an untimely indictment, suffer dismissal on that ground, and then use the six month grace period afforded by § 3288 to resuscitate the prosecution by identifying and alleging additional acts within the original limitations period. The pernicious implications of the Ninth Circuit's ruling warrant this Court's review even in the absence of a direct conflict with the decision of any other court of appeals.

A. The Ninth Circuit Ignored § 3288's Plain Text

Section 3288 tolls any applicable statute of limitation to allow the government time to correct certain defects in a dismissed indictment. The purpose of § 3288 is simply, and sensibly, to allow the government to repair defects in a charge that was not previously dismissed on grounds that bar further prosecution, such as double jeopardy or expiration of the statute of limitations. Congress made clear that the six-month grace period has no application if the *original* indictment was *itself* dismissed on statute of limitations grounds: "[§ 3288]

does not permit the filing of a new indictment * * * where the reason for the dismissal was the failure to file the [original] indictment * * * within the period prescribed by the applicable statute of limitations." 18 U.S.C. § 3288. This limitation prudently eliminates the grace period where the government did not, in the first instance, file the indictment in a timely fashion. The Ninth Circuit, in a strained and illogical reading that would expose petitioners to criminal liability on an untimely charge, effectively wrote this critical limitation out of the statute.

Inexplicably, the Ninth Circuit concluded that the district court found, and the parties supposedly agreed, that the initial indictment in this case was "timely filed." App. 11a-12a. But the district court held just the opposite. The district court unambiguously dismissed the endangerment conspiracy in the initial indictment as "time-barred" because the indictment "failed to allege an overt act in furtherance of the knowing endangerment object within the limitations period." App. 103a. When the government obtained a superseding indictment purporting to allege additional overt acts, the district court held that, because its prior dismissal was on statute of limitations grounds, the last sentence of § 3288 precluded re-indictment and the endangerment conspiracy was again "time-barred." App. 84a.

Contrary to the straightforward command of the last sentence of § 3288, the Ninth Circuit ruled that, if a superseding indictment alleges new conduct that would have brought the initial, untimely indictment within the statute of limitations, the prosecution may proceed. App. 8a. According to the Ninth

Circuit, because those newly-alleged acts occurred within the applicable limitations period, the superseding indictment simply repaired a "structural flaw" in an otherwise timely-filed indictment. *Id.* at 9a. In effect, the Ninth Circuit concluded that § 3288 permits any new allegations in a superseding indictment to "relate back" to the time of filing the initial indictment, even when the initial indictment was dismissed on statute of limitations grounds. But that is not what § 3288 directs.[7]

Only by characterizing the initial indictment as "timely filed" could the panel conclude that the second sentence of § 3288 did not bar re-indictment. Yet the panel could reach *that* conclusion only by doing precisely what the plain text of § 3288 prohibits, that is, retroactively considering the initial indictment in light of the new overt acts alleged in the superseding indictment. This analysis

[7] Section 3288 applies only to technical defects in the indictment or process, not to a statute of limitations violation in the original indictment. *See, e.g., United States v. Milstein*, 401 F.3d 53, 67 (2d Cir. 2005) (superseding indictment permitted where it "did not broaden the charges . . . but merely added a jurisdictional allegation") *cert. denied*, 128 S. Ct. 190 (2007); *United States v. Crawford*, 60 F. App'x 520, 531 (6th Cir. 2003) (re-indictment permitted where prior indictment "was brought by a grand jury selected according to [impermissible] procedures"); *United States v. Macklin*, 535 F.2d 191, 193 (2d Cir. 1976) (re-indictment permitted under § 3288 where initial indictment dismissed because term of grand jury that issued original indictment had expired); *United States v. Drucker*, 453 F. Supp. 741, 742 (S.D.N.Y. 1978) (re-indictment permitted despite defendant's argument that the "original indictment was invalid in that it was based upon excessive and misleading hearsay").

Only by characterizing the initial indictment as "timely filed" could the panel conclude that the second sentence of § 3288 did not bar re-indictment. Yet the panel could reach *that* conclusion only by doing precisely what the plain text of § 3288 prohibits, that is, retroactively considering the initial indictment in light of the new overt acts alleged in the superseding indictment. This analysis rests on the fiction that later events can show the initial indictment to have been timely when the district court determined that it was not.

Of greater concern, as applied in conspiracy cases and charges involving fraud and other schemes, this analysis will often enable the government to rescue an indictment filed after the statute of limitations has expired, thereby accomplishing precisely what the text of § 3288 explicitly prohibits. Under the Ninth Circuit's ruling, if a district court finds that all the relevant conduct alleged in an indictment took place outside the applicable limitations period—and accordingly concludes that the indictment was brought too late—all the government need do is file a superseding indictment adding new conduct within the original limitations period. So long as the superseding indictment charges the "same exact crime" based on

[impermissible] procedures"); *United States v. Macklin*, 535 F.2d 191, 193 (2d Cir. 1976) (re-indictment permitted under § 3288 where initial indictment dismissed because term of grand jury that issued original indictment had expired); *United States v. Drucker*, 453 F. Supp. 741, 742 (S.D.N.Y. 1978) (re-indictment permitted despite defendant's argument that the "original indictment was invalid in that it was based upon excessive and misleading hearsay").

timely, the statutory text explicitly forecloses the government from prosecuting further.

There is no doubt that the knowing endangerment object of the conspiracy count was filed after expiration of the applicable statute of limitations. After citing *Yates v. United States*, 354 U.S. 298 (1957), for the rule that the statute of limitations must be independently satisfied as to each object of the conspiracy, app. 93a-95a, the district court found that "the government has failed to allege an overt act in furtherance of the knowing endangerment object within the limitations period." App. 103a. As a result, the knowing endangerment object of Count I had to be "dismissed as time-barred." *Id.* Critically, the government did not appeal from this ruling.

The court of appeals did not take issue with the district court's analysis. Instead, it attributed an unprecedented and unwarranted legal import to the district court's conclusion: it held that not all "time-barred" indictments are untimely filed within the meaning of § 3288. App. 8a. But this metaphysical distinction is without legal foundation. The district court plainly found an absence of any overt act in furtherance of the endangerment conspiracy within the five-year limitations period. Indeed, the only overt acts that could have been in furtherance of the endangerment conspiracy were alleged to have occurred well before the five-year period. *See, e.g.*, App. 102a-103a. The conclusion therefore is inescapable that the knowing endangerment object in the indictment, as originally framed, was "untimely filed" at the time it was filed on February 7, 2005, and had to be dismissed for failure to satisfy

the statute of limitations. As a consequence, to treat the absence of overt acts within the limitations period as merely "a flaw that can be cured through re-indictment under § 3288" (App. 11a)—as opposed to a defect that means the indictment has been filed after expiration of the statute of limitations—is to eliminate any meaning from the second sentence of § 3288. In effect, the Ninth Circuit allowed the allegations of a superseding indictment to "relate back" and create timeliness in the first indictment, which the district court had held untimely. Given that § 3288 does not permit re-indictment where the "*reason* for the dismissal [of the original indictment] was the failure to file the indictment * * * within the period prescribed by the applicable statute of limitations" (emphasis added), the statutory language forecloses such a retroactive analysis.

Because § 3288 does not permit re-indictment where an indictment is dismissed on statute of limitations grounds, the statutory language forecloses the retroactive analysis applied by the Ninth Circuit.

B. The Ninth Circuit's Interpretation Destroys Statutory Repose for Criminal Defendants

Not only was the Ninth Circuit's interpretation of § 3288 fundamentally incorrect, the ruling has disturbing consequences for future government prosecutions. This Court has made clear that statutes of limitations play an important role in protecting the rights of defendants and creating sensible incentives for prosecutors and investigators:

> The purpose of a statute of limitations is to limit exposure to criminal prosecution to a certain fixed period of time following the occurrence of those acts the legislature has decided to punish by criminal sanctions. Such a limitation is designed to protect individuals from having to defend themselves against charges when the basic facts may have become obscured by the passage of time and to minimize the danger of official punishment because of acts in the far-distant past. Such a time limit may also have the salutary effect of encouraging law enforcement officials promptly to investigate suspected criminal activity.

Toussie v. United States, 397 U.S. 112, 114-115 (1970). *See also, e.g., United States v. Levine*, 658 F.2d 113, 125 (3d Cir. 1981) ("statutes of limitations embody historically important rights of repose and fairness for defendants which are fundamental to our system of criminal law").

But under the Ninth Circuit's ruling, so long as a superseding indictment rests on "approximately the same facts" (App. 11a) (and what superseding indictment would not be?) the government would, in effect, have an extra six months after virtually ***any*** dismissal of a conspiracy charge on statute of limitations grounds to find overt acts that would transform the original indictment into one that, viewed in retrospect, could have been "timely filed." This result is different in kind from § 3288's goal of allowing the government additional time to correct

technical defects in indictments that were originally filed before expiration of a statute of limitations.

This consequence is particularly alarming in the context of conspiracy prosecutions. Justice Jackson famously remarked that conspiracy is an "elastic, sprawling and pervasive offense," that is "so vague that it almost defies definition." *Krulewitch* v. *United States*, 336 U.S. 440, 445, 446-47 (1949) (Jackson, J. concurring). He therefore joined in an opinion rejecting the assumption that every conspiracy is inevitably followed by a second, "implied agreement to conceal" the original violation. *Id.* at 443. He was motivated in part by a concern that such an assumption would result in "an indeterminate extension of the statute of limitations." *Id.* at 457. The Ninth Circuit accomplished that pernicious result by different and more direct means. Its error is one of extraordinary importance, running roughshod over the concept of statutory repose, denying defendants their substantial rights, and contravening the manifest intent of Congress when it enacted § 3288. This Court's review is therefore warranted.

CONCLUSION

For the foregoing reasons, and the reasons set forth in the petition filed by Grace, petitioners respectfully request that the Court grant the writ of certiorari and reverse the judgments of the Ninth Circuit.

Respectfully submitted,

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APPENDIX

APPENDIX A

COURT OF APPEALS OPINION

FOR PUBLICATION
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, *Plaintiff-Appellant,* v. W.R. GRACE; ALAN R. STRINGER; HENRY A. ESCHENBACH; JACK W. WOLTER; J. MCCAIG; ROBERT J. BETTACCHI; O. MARIO FAVORITO; ROBERT C. WALSH, *Defendants-Appellees.*	No. 06-30472 D.C. No. CR-05-00007-DWM
UNITED STATES OF AMERICA, *Plaintiff-Appellant,* v. W.R. GRACE; ALAN R. STRINGER; HENRY A. ESCHENBACH; JACK W. WOLTER; WILLIAM MCCAIG; ROBERT J. BETTACCHI; O. MARIO FAVORITO; ROBERT C. WALSH, *Defendants-Appellees.*	No. 06-30524 D.C. No. CR-05-00007-DWM OPINION

Appeal from the United States District Court
for the District of Montana
Donald W. Molloy, District Judge, Presiding

Argued and Submitted
June 4, 2007 — Seattle, Washington

Filed September 20, 2007

Before: Betty B. Fletcher, Harry Pregerson, and

Warren J. Ferguson, Circuit Judges.

Opinion by Judge B. Fletcher

COUNSEL

Todd S Aagaard, Dept. of Justice Environment and Natural Resources Division, Washington, D.C., and Kris A. McLean, Assistant United States Attorney, Missoula, Montana, argued for the government. With them on the briefs were Sue Ellen Wooldridge, Assistant Attorney General; William W. Mercer, United States Attorney; Eric E. Nelson, Linda Kato, Special Assistant United States Attorneys; Kevin M. Cassidy, and Allen M. Brabender, Attorneys, United States Dept. of Justice Environment and Natural Resources Division.

Christopher Landau, Washington, D.C., argued for defendant-appellee W.R. Grace & Co. With him on the brief were Laurence A. Urgenson, Tyler D. Mace, Michael D. Shumsky, Washington, D.C.; Stephen R. Brown, Charles E. McNeil, Kathleen L. DeSoto. Missoula, Montana, for defendant-appellee W.R. Grace & Co.; Angelo J. Calfo, Seattle, Washington; Michael F. Bailey, Missoula, Montana, for defendant-appellee Alan R. Stringer; Ronald F. Waterman, Helena, Montana; David S. Krakoff, Gary A. Winters, Washington, D.C., for defendant-appellee Henry A. Eschenbach; Mike Milodragovich, W. Adam Duerk, Missoula, Montana; Mark Holscher, Jeremy Maltby, Los Angeles, California, for defendant-appellee Jack W. Wolter; Palmer Hoovestal, Helena, Montana, Elizabeth Van Doren Gray, Columbia, South Carolina, William A. Coates, Greenville, South Carolina, for defendant-appellee William J. McCaig; Brian Gallik, Bozeman,

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OPINION

B. FLETCHER, Circuit Judge:

From 1963 until the early 1990s, W.R. Grace ("W.R. Grace" or "Grace") mined and processed a rich supply of vermiculite ore outside of Libby, Montana. In response to ongoing serious health problems suffered by Libby residents, the government obtained an indictment charging W.R. Grace and seven of its executives (together "Grace") with criminal conduct arising from Grace's vermiculite operation in Libby. The superseding indictment charges defendants-appellees with (1) conspiring knowingly to release asbestos, a hazardous air pollutant, into the ambient air, thereby knowingly placing persons in imminent danger of death or serious bodily injury in violation of 42 U.S.C. § 7413(c)(5)(A) and (2) conspiring to defraud the United States in violation of 18 U.S.C. § 371. In addition to the dual-object conspiracy alleged in Count I, the indictment charged defendants-appellees with three counts of knowing endangerment under the Clean Air Act, 42 U.S.C. § 7413(c)(5)(A), and four counts of obstruction of justice in violation of 18 U.S.C. §§ 1505 and 1515(b).

This interlocutory appeal brought by the government concerns six orders grouped into four sections: the first order dismissed the knowing endangerment object of Count I's conspiracy charge; the second adopted a particular definition of asbestos and excluded evidence inconsistent with that definition; the third denied a motion to exclude evidence related to an affirmative defense and relied on an emission standard for asbestos contained in certain Environmental Protection Agency ("EPA") regulations, *see, e.g.*, 40 C.F.R. §§ 61.142-61.149; and the fourth through sixth orders excluded certain evidence and expert testimony. In addition, we rule on defendants-appellees' motion to strike documents attached to the government's reply brief. We have jurisdiction to hear this appeal pursuant to 18 U.S.C. § 3131, and we reverse in part, affirm in part, and remand.

I. Dismissal of the Knowing Endangerment Object

1. Background

In the original indictment, filed February 7, 2005, the government charged defendants with participating in a dual-object conspiracy. According to Count I of the indictment, which details the scope of the conspiracy, defendants conspired (1) to knowingly release asbestos, a hazardous air pollutant, and thus knowingly to endanger both EPA employees and members of the Libby community in violation of 42 U.S.C. § 7413(c)(5)(A) ("knowing endangerment object"); and (2) to defraud the United States by impairing, impeding, and frustrating government agency investigations and cleanup operations in violation of 18 U.S.C. § 371 ("defrauding object"). On March 20, 2006, defendants moved to dismiss the knowing

endangerment object of the conspiracy, arguing that the government had failed to allege an overt act in furtherance of the alleged conspiracy within the statute of limitations period. *United States v. W.R. Grace*, 434 F. Supp. 2d 879, 883 (D. Mont. 2006).

Defendants' argument relied primarily on *Yates v. United States*, 354 U.S. 298 (1957) (holding that the statute of limitations must be satisfied as to each object of the conspiracy when the government charges a multi-object conspiracy), *overruled on other grounds by Burks v. United States*, 437 U.S. 1, 2 (1978). Because the government supposedly had failed to allege a requisite overt act before the statute of limitations ran on November 3, 2004, defendants asserted that the knowing endangerment object was time-barred.

The government disputed defendants' characterization of the indictment, claiming that certain overt acts alleged in the indictment could support both the fraud object and the knowing endangerment object of Count I's conspiracy charge. Towards this end, the government directed the district court's attention to paragraphs 143, 149, and 173-184 of the indictment. *W.R. Grace*, 434 F. Supp. 2d at 885-87. The paragraphs cited by the government alleged that defendants had failed to remove asbestos-contaminated material from sites in the Libby community, had misled various individuals regarding current asbestos contamination, and had failed to disclose the existence of numerous asbestos-contaminated sites. What the paragraphs purportedly failed to allege was that defendants released, or conspired to release, asbestos during the relevant time period.

Analyzing both the text of the specified paragraphs and the structure of the indictment, in which the cited paragraphs were listed under the sub-heading "Obstruction of EPA's Superfund Clean-Up," the district court concluded that the indictment "more plausibly suggests a completed operation than a conspiracy still at work." *Id.* at 887. To the extent that overt acts were alleged, the district court found that they were acts of obstruction, not acts of wrongful endangerment. *Id.* Thus, the district court dismissed as time-barred the knowing endangerment object of the Count I conspiracy. *Id.* at 888.

Two weeks after the district court's first order, dismissing a portion of the indictment, the government obtained a superseding indictment. The new indictment was substantially similar to the original indictment, amending only paragraphs 1731-83, which had been the focus of the district court's previous order. In the superseding indictment, the government changed the section heading under which the disputed paragraphs had been listed from "Obstruction of Superfund Clean-Up" to "Knowing Endangerment of EPA Employees and the Libby Community and Obstruction of the EPA's Superfund Clean-Up." It also changed paragraphs 173, 174, 176-80, 182 and 183, by adding at the end of each original paragraph the phrase, "thereby concealing the true hazardous nature of the asbestos contamination, delaying EPA's investigation and causing releases of asbestos into the air in the Libby Community."[1]

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[1] Paragraph 175 was changed significantly.

Defendants then moved to dismiss the "knowing endangerment" object of the superseding indictment, arguing that the government had failed to fix the original indictment because the new indictment alleged no new overt acts, was barred by the previous dismissal "with prejudice," and was time-barred because the statute of limitations had run. The district court rejected the first two arguments, but agreed with defendants that the new indictment was time-barred. Under the district court's reading, the superseding indictment was not protected by the savings clause of 18 U.S.C. § 3288. Order at 17, *United States v. W.R. Grace*, 9:05-cr-00007-DWM ("Order Dismissing Indictment") (July 27, 2006) (Docket # 690). The government now appeals that determination.

2. Standard of Review

We review de novo a district court's decision to dismiss part of an indictment, *United States v. Barrera-Moreno*, 951 F.2d 1089, 1091 (9th Cir. 1991), as we review, also de novo, the district court's interpretation of 18 U.S.C. § 3288. *United States v. Gorman*, 314 F.3d 1105, 1110 (9th Cir. 2002).

3. Analysis

If a district court dismisses an indictment (or portion thereof), the savings clause of 18 U.S.C. § 3288 permits the government to return a new indictment after the statute of limitations has expired, as long as it is done within six months of the dismissal. The statute reads as follows:

> Whenever an indictment or information charging a felony is dismissed for any reason after the period prescribed by the applicable statute of limitations has expired, a new

> indictment may be returned in the appropriate jurisdiction within six calendar months of the date of the dismissal of the indictment or information ..., which new indictment shall not be barred by any statute of limitations. This section does not permit the filing of a new indictment or information where the reason for the dismissal was the failure to file the indictment or information within the period prescribed by the applicable statute of limitations, or some other reason that would bar a new prosecution.

The dispute in the instant case stems from the parties' divergent interpretations of the final sentence of § 3288. This sentence explains that the savings clause does not extend to indictments initially filed outside of the statute of limitations. The government takes the position that this does not bar the return of the new indictment because the original indictment was obtained before the statute of limitations expired. Thus, the government argues, § 3288 permits amendment by a superseding indictment. Defendants disagree, arguing that the government failed to allege an overt act for the knowing endangerment object of the conspiracy before the statute of limitations expired. The district court agreed with defendants and dismissed the knowing endangerment object as time-barred.

Defendants' argument is premised on a conflation of the terms "time-barred" and "not timely filed." The last sentence of § 3288 refers to indictments that were not timely filed, i.e., indictments that were not filed within the statute of limitations. Here, there is no dispute that the government *filed* its indictment

within the statute of limitations period. The district court dismissed the knowing endangerment object in the original indictment as "time-barred" because it failed to allege an overt act within the statute of limitations, not because the indictment was untimely filed. The district court erred. If the indictment is filed within six months of the dismissal order, § 3288 does not bar the government from filing a superseding indictment: the savings clause of § 3288 permits amendment when the original was structurally flawed but timely filed. *United States v. Clawson*, 104 F.3d 250 (9th Cir. 1996).

In *Clawson*, the defendant was indicted for mail fraud on June 10, 1993. *Id.* at 251. Defendant immediately moved to dismiss the indictment for failure to allege an overt act within the five-year statute of limitations. *Id.* The indictment alleged overt acts that occurred before the limitation period began on June 10, 1988, or after defendant's withdrawal from the conspiracy on July 5, 1988. *Id.* The district court granted defendant's motion to dismiss the indictment and the government responded by obtaining a First Superseding Indictment, which alleged overt acts occurring in the window between June 10, 1988, and July 5, 1988. *Id.* Defendant then moved to dismiss the new indictment, arguing that the statute had run before the government obtained the First Superseding Indictment and that § 3288 did not extend to indictments dismissed for failure to comply with the statute of limitations. *Id.* The district court denied his motion and we affirmed. *Id.* at 251-52.

Clawson noted that when "[r]ead in its entirety, th[e] last sentence [of § 3288] cuts off the six-month grace period only where the defect—whether it's a

limitations problem 'or some other' problem—is not capable of being cured." *Id.* at 252. In the instant case, the district court held (and defendants now argue) that the defect in the original indictment obtained by the government is not capable of being cured because the original indictment did not allege an overt act for the knowing endangerment object before the statute of limitations expired. This position, however, is precluded by *Clawson.*

In *Clawson* we distinguished between a timely filed, but flawed, indictment, to which the savings clause of § 3288 does apply, and an untimely filed indictment, to which it does not.

> "[I]f the original indictment was brought after the limitations period ran on all the alleged criminal conduct, allowing reindictment under section 3288 would obliterate the statute of limitations: A defendant could be indicted two years after the statute had run and, when the court dismissed, the prosecution could simply reindict within six months, free from the limitations bar." *Id.*

For obvious reasons, reindictment is prohibited by § 3288 in such circumstances. *Id.*

> "The matter is much different where the original indictment is brought within the limitations period, but is dismissed for failure to allege the exact elements of the crime, or some other technical reason. In the latter circumstance, a valid indictment could have been brought in a timely fashion; the six-month grace period merely allows the government to do what it had a right to do in the first place." *Id.*

The latter circumstance describes the facts of both *Clawson* and the instant case. In both cases, the government timely indicted defendants for a particular crime, but originally failed to allege a valid overt act. The government then obtained superseding indictments charging defendants with the exact same crimes, but adding the necessary overt act allegations. Thus, each defendant was charged "with the exact crime for which he could have been prosecuted had there not been a defect in the indictment. Section 3288 was designed to apply in this situation." *Id.; see also United States v. Charnay*, 537 F.2d 341, 354 (9th Cir. 1976) ("[The] underlying concept of § 3288 is that if the defendant was indicted within time, then approximately the same facts may be used for the basis of any new indictment [obtained after the statute has run] ... , if the earlier indictment runs into legal pitfalls.").

When discussing "timeliness," both *Clawson* and *Charnay* refer to the time of the original filing of the indictment. They do not consider whether the original indictment included all of the relevant acts or elements necessary to charge defendants with the crime. As long as the original indictment is filed within the statute of limitations and charges the same crime, based upon approximately the same facts charged in the superseding indictment, § 3288 allows the government to file a superseding indictment within six months. *See* 18 U.S.C. § 3288; *Clawson*, 104 F.3d at 251-52; *Charnay*, 537 F.2d at 354. Here, the parties do not dispute that the original indictment was timely filed. The district court's holding that the indictment was time-barred referred only to its failure to allege the necessary overt acts in the original indictment—a flaw that can be cured through re-indictment under § 3288.

The district court attempted to distinguish *Clawson*, stating that in *Clawson* the government alleged overt acts in the original indictment, which was filed within the limitations period. This distinction is irrelevant. While the government did allege overt acts before the limitations period expired in *Clawson*, it failed to allege an overt act sufficient to support the conspiracy charge since the only overt acts alleged occurred outside the statute of limitations or subsequent to Clawson's withdrawal from the conspiracy. Thus, the government originally failed to allege any relevant overt acts in *Clawson*, just as in the instant case.

Moreover, *Clawson* did not turn on the distinction advanced by the district court: as we have explained, § 3288 applies when an indictment (though defective) is brought within the limitations period, and the superseding indictment charges defendant with the same exact crime with which he was initially charged, based on approximately the same facts. The only addition in the new indictment considered in *Clawson* was the inclusion of new overt acts that the government could have used in the original indictment. The fact that the government had timely alleged inapplicable overt acts was wholly extraneous to the *Clawson* court's decision.

The district court's misapprehension of both *Clawson* and § 3288 is also clear from its statement that "[t]o allow the government a six-month grace period in this case would extend the statute of limitations for the improper purpose of affording the prosecution a second opportunity to do what it failed to do in the beginning." Order Dismissing Indictment at 16. Yet this is exactly what § 3288 does. It extends the statute of limitations by six

months to allow the prosecution a second opportunity to do what it failed to do in the beginning: namely, file an indictment free of legal defects.

This reading of § 3288 does not, as the district court suggests, "require a defendant to remain subject to an indefinite threat of prosecution, held open beyond the statute of limitations period, while he and the court wait for the government to finish tinkering with the indictment." *Id.* What § 3288 does is twofold: First, it eliminates the incentive for criminal defendants to move for dismissal of an indictment at the end of the statute of limitations, thereby winning dismissal at a time when the government cannot re-indict. And second, it subjects defendants to the threat of prosecution for six months after the dismissal of the original indictment—not an indefinite threat of prosecution as the district court suggests—and only if the government has timely filed an indictment charging the exact same crimes based on approximately the same facts.

For the reasons articulated herein, we reverse the district court's dismissal of the knowing endangerment object of Count I in the superseding indictment and reinstate that portion of the count.

II. Definition of Asbestos

1. Background

We now turn to the question of whether Congress's use of the term "asbestos" to identify a hazardous air pollutant created ambiguity as to what substance was meant by that term. The parties filed cross motions in limine to exclude evidence that fell outside their respective

interpretations of the term. Govt. Mot. in Limine #2 Re: Definition of Asbestos (Docket # 462); Defs' Mot. in Limine Re: Definition of Asbestos (Docket # 474). The district court held that the term "asbestos" has no inherent meaning and therefore its use in the criminal provisions of the Clean Air Act violated the rule of lenity and the Due Process Clause of the Fourteenth Amendment. It interpreted asbestos for purposes of the Clean Air Act's knowing endangerment provision to mean the six minerals covered by EPA's civil regulatory scheme. Order at 2 & 20, *United States v. W.R. Grace*, 9:05-cr-00007-DWM ("Order Defining Asbestos") (Aug. 8, 2006) (Docket # 701). That regulation defines the civilly regulated species of asbestos as "the asbestiform varieties of serpentinite (chrysotile), riebeckite (crocidolite), cummingtonite-grunerite, anthophyllite, and actinolite-tremolite." Definitions for National Emission Standards for Hazardous Air Pollutants ("NESHAPs"), 40 C.F.R. § 61.141 (2007).

The district court imported the civil regulatory definition of "asbestos" into the criminal provisions of the Clean Air Act, and then ruled that evidence of asbestos releases offered at trial would be limited to those relevant to proving releases of the six minerals included in the regulatory definition; evidence of releases of other asbestiform minerals would be excluded. Order Defining Asbestos at 22. This ruling eliminated from trial evidence of releases of 95% of the contaminents in the Libby vermiculite—which are asbestiform minerals but fall outside of the six minerals in the civil regulatory definition—as well as excluding government data that did not differentiate between the six regulated minerals and unregulated asbestiform minerals. The government appeals, asserting that the definition contained in

the criminal portion of the statute is the applicable definition.

2. Standards of Review

We review de novo the district court's construction of the Clean Air Act, as we do rulings on the admissibility of evidence in which issues of law predominate. *See United States v. Mateo-Mendez*, 215 F.3d 1039, 1042 (9th Cir. 2000).

3. Analysis

The Clean Air Act's knowing endangerment provision prohibits the knowing and dangerous release into the ambient air of "any hazardous air pollutant listed pursuant to § 7412." 42 U.S.C. § 7413(c)(5)(A).[2] Section 7412(b) lists "asbestos," also

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[2] 42 U.S.C. § 7413(c)(5)(A) reads in relevant part:

> Any person who knowingly releases into the ambient air any hazardous air pollutant listed pursuant to section 7412 of this title ... , and who knows at the time that he thereby places another person in imminent danger of death or serious bodily injury shall, upon conviction, be punished by a fine under Title 18, or by imprisonment of not more than 15 years, or both. Any person committing such violation which is an organization shall, upon conviction under this paragraph, be subject to a fine of not more than $1,000,000 for each violation. If a conviction of any person under this paragraph is for a violation committed after a first conviction of such person under this paragraph, the maximum punishment shall be doubled with respect to both the fine and imprisonment. For any air pollutant for which the Administrator has set an emissions standard or for any source for which a permit has been issued under subchapter V of this chapter, a release of such pollutant in accordance with that standard or permit shall not constitute a violation of this paragraph or paragraph (4).

identified by its Chemical Abstracts Service ("CAS") [3] Registry number 1332-21-4, as a hazardous air pollutant. 42 U.S.C. § 7412(b). Thus, § 7412(b) identifies asbestos by name and defines it through reference to CAS Registry # 1332-21-4.

The government contends that a statute may have two definitions for one term, one definition civil and one criminal. Further, it argues that the definition of asbestos applicable to the Clean Air Act's criminal knowing endangerment provision covers the minerals involved in this case. We agree on both points.

The district court found § 7412(b)'s "one-word definition"[4] to be "unsatisfactory" as a matter of law. However, Congress need not define every word in a criminal statute for the statute to pass Constitutional muster. When Congress does not define a term in a statute, we construe that term "according to [its] ordinary, contemporary, common meaning[]." *United States v. Cabaccang*, 332 F.3d 622, 626 (9th Cir. 2003) (en banc) (internal quotation marks omitted). It is well known that asbestos has a common meaning; it is a fibrous, non-combustible

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[3] The Chemical Abstracts Service Registry, maintained by the American Chemical Society, is an authoritative database of chemical information. The Registry assigns each chemical substance a unique numeric identifier. Searches in the Registry require subscription. However, EPA maintains on its website a free "Substance Registry System" containing CAS Registry information, including the CAS definition of asbestos. http:// www.epa.gov/srs/ (search "asbestos"; follow link associated with 1332-21-4) (last visited Aug. 3, 2007).

[4] I.e., "1332214 Asbestos"

compound that can be composed of several substances, typically including magnesium. Or, as defined by the CAS Registry, and incorporated by reference into § 7412(b), it is a "grayish non-combustible material" that "consists primarily of impure magnesium silicates." CAS Registry number 1332-21-4, *available at* http://iaspub.epa.gov/srs/srs_proc_qry.navigate?P_SUB_ID=85282. This definition has been established for decades, as was elucidated in the motions in limine. *See* Defs' Mot. in Limine Re: Definition of Asbestos n.4 (Expert Witness Disclosure of Gregory P. Meeker, Appendix A) (May 31, 2006) (noting that asbestos was first defined in 1920).

In addition, defendants had actual notice in this case of the risks from the fibrous content of the asbestiform minerals in their products. Defendants are an industrial chemical company and seven of its top executives. They are all familiar with asbestos. Since at least 1976, defendants have known of the health risks posed by the asbestiform minerals in their products. It is clear that defendants knew or should have known that their mining, milling, and distribution activities risked the release of asbestos into the ambient air. In light of the clear statutory language, including § 7412(b)'s incorporation by reference of the CAS Registry asbestos definition, and defendants' knowledge of the industrial chemicals field, the district court erred in misdefining "asbestos" as used in the criminal statute and in invoking the rule of lenity. *See Muscarello v. United States*, 524 U.S. 125, 138 (1998) ("The rule of lenity applies only if, after seizing everything from which aid can be derived, ... we can make no more than a guess as to what

Congress intended.") (alteration in original) (internal quotation marks omitted); *United States v. Lanier*, 520 U.S. 259, 266 (1997) (The "rule of lenity[] ensures fair warning by so resolving ambiguity in a criminal statute as to apply [the statute] only to conduct clearly covered.").

The district court's conclusion that ambiguity exists simply because of the existence of two oversight structures—a civil regulatory structure and a criminal enforcement provision—that use different definitions of the term "asbestos" is erroneous. As we determined in *United States v. Hagberg*, 207 F.3d 569, 573 (9th Cir. 2000), Congress validly may create multiple enforcement mechanisms that each draw on different definitions for the same term or phrase.

In *Hagberg*, defendant was indicted for allegedly dumping sewage along a public road in violation of the Clean Water Act, 33 U.S.C. §§ 1319(c)(2), 1345(e). *Hagberg* at 570. Moving to dismiss the indictment, *Hagberg* argued that his actions did not fit within the statutory definition of the crime because the material he dumped was not "sewage sludge" as defined by the regulations for permitting waste disposal. *Id.* at 571. Accepting Hagberg's argument, the district court dismissed the indictment. The government appealed. *Id.* We reversed because the district court improperly had conflated the regulatory and direct enforcement provisions of the Clean Water Act, and the relevant definition—supplied by the direct enforcement provision—covered the material dumped by defendant. *Id.* at 571-72, 575. We explained that "some terms found in the [direct enforcement provision] are defined differently when used in the

context of [the civil permitting] regulations." *Id.* at 572.

Like the Clean Water Act provisions at issue in *Hagberg*, the Clean Air Act creates multiple enforcement mechanisms: a civil regulatory structure and a direct enforcement mechanism. In the instant case, as in *Hagberg*, defendants are charged with violating the directly enforceable provision of the statute that pulls its definitions from a separate provision than does the regulatory provision. The civil regulatory system draws its definition of asbestos from 40 C.F.R. § 61.141, the knowing endangerment provision from 42 U.S.C. § 7412(b). *See* 42 U.S.C. §§ 7412(a)(6); 7413(c)(5)(A). The civil regulatory system regulates major sources of hazardous air pollutants, 42 U.S.C. § 7412(c)-(g), and therefore understandably focuses on a subset of asbestifom minerals deemed to have commercial potential; market forces preclude commercially non-viable species of asbestos from becoming major sources of pollution from asbestos mills and mines and other covered sources. The direct enforcement mechanism created in 42 U.S.C. § 7413 focuses on risks to health. Therefore it provides oversight of release of hazardous pollutants whether or not they come from major sources of pollution. We defer to Congress's decision to create two enforcement structures and hold the district court's conflation of the two to be error.

In sum, the district court improperly limited the term "asbestos" to the six minerals covered by the civil regulations. Asbestos is adequately defined as a term and need not include mineral-by-mineral classifications to provide notice of its hazardous nature, particularly to these knowledgeable

defendants. Accordingly, we reverse the order limiting evidence to that fitting within the civil regulations.

III. Mandamus

1. Background

The knowing endangerment provision of the Clean Air Act establishes an affirmative defense for hazardous air pollutants released "in accordance with" an applicable National Emissions Standards for Hazardous Air Pollutants ("NESHAP"). *See* 42 U.S.C. § 7413(c)(5)(A). In the proceedings before the district court, the government argued that defendants could not avail themselves of this affirmative defense because no NESHAP applied to W.R. Grace's operations in Libby; thus, compliance with an "applicable" NESHAP was impossible. The district court rejected this argument, finding that the regulations created an emissions standard of "no visible emissions" for asbestos. Accordingly, the district court ruled that it would allow defendants to introduce evidence at trial to try to prove their affirmative defense. Because the district court did not exclude any of the government's emissions evidence as a result of this ruling, the government cannot appeal the district court's decision. Instead, it now seeks a writ of mandamus to overturn the decision.

2. Standard of Review

The writ of mandamus is codified at 28 U.S.C. § 1651(a): "The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law." This court has developed a five-

factor test for determining whether a writ may issue. We must consider whether:

(1) The party seeking the writ has no other adequate means, such as direct appeal, to attain the relief he or she desires.

(2) The petitioner will be damaged or prejudiced in a way not correctable on appeal.

(3) The district court's order is clearly erroneous as a matter of law.

(4) The district court's order is an oft-repeated error, or manifests a persistent disregard of the federal rules.

(5) The district court's order raises new and important problems, or issues of law of first impression.

Clemens v. U. S. Dist. Ct., 428 F.3d 1175, 1177-78 (9th Cir. 2005) (quoting *Bauman v. United States Dist. Ct.*, 557 F.2d 650, 654-55 (9th Cir. 1977)). Not every factor must be present to warrant mandamus relief, *see id.* at 1178, and in this case the only disputed issue is whether the district court made a clear error as a matter of law.

3. Analysis

Where, as here, the district court's order involves issues of statutory interpretation, the order is clearly erroneous as a matter of law if the reviewing court is left with "a definite and firm conviction that the district court's interpretation of the statute was incorrect." *DeGeorge v. United States Dist. Court*, 219 F.3d 930, 936 (9th Cir. 2000) (citing *In re Cement Antitrust Litig.*, 688 F.2d 1297, 1306 (9th Cir. 1982)); *see also United States v. Ye*, 436 F.3d 1117, 1123 (9th Cir. 2006). Here, the plain language

of the statute makes clear that the affirmative defense is not applicable to defendants' actions.

In relevant part, § 7413(c)(5)(A) states, "[f]or any air pollutant for which the Administrator has set an emissions standard ..., a release of such pollutant in accordance with that standard ... shall not constitute a violation of this paragraph." The first clause of the affirmative defense makes it inapplicable to Grace's alleged asbestos releases. Quite simply, asbestos is not an "air pollutant for which the Administrator has set *an* emissions standard." § 7413(c)(5)(A) (emphasis added). Rather, the Administrator has set *several* emissions standards, each of which is source dependent. Some asbestos emissions standards make no reference at all to "visible emissions." *See* 40 C.F.R. §§ 61.143, 61.145, & 61.148. Others include additional procedural requirements, above and beyond the "no visible emissions" requirement. *See* 40 C.F.R. §§ 61.142, 61.144, 61.146, 61.149, & 61.150. In short, there is simply no trans-categorical emissions standard for asbestos; neither is there an emissions standard for asbestos releases from mining operations.[5] Therefore, it is inconceivable that the alleged Grace releases were "in accordance with that standard." § 7413(c)(5)(A). The plain language of the statute makes clear that the affirmative defense simply doesn't apply in this case. The district court's order

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[5] A perusal of the table of contents for 40 C.F.R. § 61 shows that most hazardous pollutants do in fact have a single emissions standard, enumerated in a single code section. *See, e.g.*, §§ 61.22, 61.32, 61.42, 61.52. Asbestos, however, does not. *See* §§ 61.142-.151.

to the contrary leaves us with a "a definite and firm conviction" that it got the law wrong. *DeGeorge*, 219 F.3d at 936. Consequently, we grant the government's petition for writ of mandamus, and hold that W.R. Grace can not avail itself at trial of the affirmative defense articulated in 42 U.S.C. § 7413(c)(5)(A).

IV. Evidentiary Rulings

1. Introduction

As stated above, Counts II-IV of the superseding indictment allege violations of 42 U.S.C. § 7413(c)(5)(A), the Clean Air Act's knowing endangerment provision, which creates criminal penalties for a person who "knowingly releases into the ambient air any hazardous air pollutant listed pursuant to section 7412 of this title ... and who knows at the time that he thereby places another person in imminent danger of death or serious bodily injury." Defendants filed motions in limine seeking to exclude evidence related to, or testimony based on, certain studies—EPA indoor air studies ("Indoor Air studies"), Grace's historic testing of its vermiculite products ("Historic Testing"), a report of the Agency for Toxic Substances and Disease Registry based on a medical screening study of residents of Libby, Montana ("ATSDR Report"), and the results of the screening study published as an article in a peer-reviewed journal ("Peipins Publication"). Ruling that these studies were unreliable, irrelevant, or unduly prejudicial, the district court barred government experts from relying on them in forming opinions regarding the knowing endangerment charges, and, as to the indoor air studies, the ATSDR Report, and the Peipins Publication, excluding the studies, report, and publication

themselves for most or all purposes. Order, *United States v. W.R. Grace*, 9:05-cr-00007DWM (Aug. 21, 2006) ("Indoor Air Order"); Order, *United States v. W.R. Grace*, 9:05-cr-00007-DWM (Aug. 28, 2006) ("Historical Testing Order"); Order, *United States v. W.R. Grace*, 9:05-cr-00007-DWM (Aug. 31, 2006) ("ATSDR and Peipins Order"). The government appeals.

2. Standard of Review

This court reviews de novo the district court's interpretation of the Federal Rules of Evidence. *United States v. Sioux*, 362 F.3d 1241, 1244 n.5 (9th Cir. 2004). In general, this court reviews for abuse of discretion a district court's decision to admit or exclude scientific evidence and expert testimony. *United States v. Finley*, 301 F.3d 1000, 1007 (9th Cir. 2002). "[A] trial court has 'broad discretion' in assessing the relevance and reliability of expert testimony." *Id.* (quoting *United States v Murillo*, 255 F.3d 1169, 1178 (9th Cir. 2001)).

3. Relevant Rules

Federal Rule of Evidence 401 defines "relevant evidence" as that which has "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Rule 402 provides that relevant evidence is admissible, except as limited by the Constitution, statutes, or other rules of evidence. Rule 403 provides a balancing test for the exclusion of relevant evidence on the grounds of prejudice: relevant evidence may be excluded if "probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury...."[6]

Several rules apply specifically to testimony by experts. Under Rule 702, an expert witness may provide opinion testimony if "the testimony is based upon sufficient facts or data" and "is the product of reliable principles and methods," which have been "applied ... reliably to the facts of the case." The rule "affirms the court's role as gatekeeper and provides some general standards that the trial court must use to assess the reliability and helpfulness of proffered expert testimony." Advisory Comm. Notes, Rule 702 (2000).

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[6] Advisory committee notes from 1972 discuss the meaning of unfair prejudice—the "undue tendency to suggest decision on an improper basis, commonly ... an emotional one"—and observe that the "availability of other means of proof may also be an appropriate factor" of determining when there is unfair prejudice.

Under Rule 703, the "facts or data ... upon which an expert bases an opinion or inference may be those perceived by or made known to the expert at or before the hearing. If of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence in order for the opinion or inference to be admitted." However, if the expert relies on facts or data that are otherwise inadmissible, then those facts "shall not be disclosed to the jury by the proponent of the opinion or inference unless the court determines that their probative value in assisting the jury to evaluate the expert's opinion substantially outweighs their prejudicial effect."[7]

4. Analysis

A. Indoor Air Releases

i. Background

On May 31, 2006, Defendants filed a motion in limine to exclude evidence of or derived from indoor asbestos releases. Defendants sought to exclude documents and studies, including EPA's Phase II air sampling charts, as well as expert testimony that

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[7] To the extent that inadmissible evidence is reasonably relied upon by an expert, a limiting instruction typically is needed—i.e., the evidence is admitted only to help the jury evaluate the expert's evidence. *E.g., United States v. 0.59 Acres of Land,* 109 F.3d 1493, 1496 (9th Cir. 1997) (error to admit hearsay offered as the basis of an expert opinion without a limiting instruction). There is a presumption against disclosure to the jury of inadmissible information used as the basis for expert's opinion. *See* Advisory Comm. Notes, Rule 703 (2000).

relied upon these studies. *See* Defs' Mot. in Limine Re: Indoor Air Releases at 4-6 (Docket # 473).

On August 28, 2006, the district court granted defendants' motion "with respect to evidence of or derived from indoor releases offered for the purpose of proving an 'ambient air' release in violation of 42 U.S.C. § 7413(c)(5)(A)." Indoor Air Order at 11. The district court held that "[i]ndoor sampling performed by EPA in the course of its CERCLA activities, and testimony based upon this sampling, is not relevant [under Fed. R. Evid. 402] to whether Defendants committed a release in violation of the Clean Air Act, and is not admissible for the purpose of proving such a release." *Id.* at 8. The court stated that, under Federal Rules of Evidence 403, "[e]vidence derived from EPA testing and sample collection performed as part of its CERCLA analysis has the potential to be highly confusing and prejudicial," *id.* at 10, and barred the evidence for most purposes related to the Clean Air Act counts. However, the court held that the evidence had probative value with respect to defendants' "knowledge of the dangerousness of the asbestos contaminated vermiculite," *id.* at 8, relevant to the government's argument that defendants knowingly "place[d] another person in imminent danger of death or serious bodily injury," 42 U.S.C. § 7413(c)(5)(A), by releasing vermiculite into the community. In addition, the district court held the evidence relevant to the defrauding object of Count I's conspiracy charge and to the four counts of obstruction of justice in the superseding indictment. The district court thus denied the motion with respect to establishing knowledge of risk for the Clean Air Act charges and with respect to proving the obstruction and conspiracy counts. The government appeals the exclusion of the Indoor Air

studies and expert testimony based upon them with regard to the knowing endangerment counts.

ii. Analysis

The government argues that EPA's Phase II tests show the propensity of the Libby asbestos to release fibers whenever it was disturbed and regardless of the form the vermiculite took and therefore should be admitted to form the basis of expert testimony. The government also makes an argument that the Indoor Air studies should themselves be admitted as relevant. However, although the government makes a valid argument about the friability of Libby asbestos being the same whether indoors or outdoors, the probative value of the EPA studies is possibly outweighed by the danger of unfair prejudice. First, the studies' overall probative value is low because they largely concern the asbestos releases at various indoor locations in Grace's Libby mining and milling operation. There is some information in the studies regarding the friable character of Libby asbestos, but not much. There is a risk of unfair prejudice because the indoor releases may not reflect the level of releases into the ambient air, and there is some language in the studies regarding asbestos-related diseases in Libby that may mislead or confuse the jury into believing that releases into indoor air proves releases into ambient air. Finally, even if this court disagreed with the district court's Rule 403 balancing, "[a]n appellate court will not reengage in a balancing of the probative value and prejudicial effect." *Rogers v. Raymark Industries, Inc.*, 922 F.2d 1426, 1430 (9th Cir. 1991). The district court's decision to bar the use of documents and studies derived from indoor air

releases for the purpose of proving a release into the ambient air was within its discretion.

It is a separate question, however, whether the district court abused its discretion in excluding expert testimony based on documents and studies derived from indoor air releases. The district court did not conduct an inquiry under Rule 702[8] or 703[9] in its August 28th order. Rule 703 provides, "If of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, *the facts or data need not be admissible* in evidence in order for the opinion or inference to be admitted." (Emphasis added.) The government persuasively argues that the proper remedy for the problems associated with the indoor

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[8] Fed. R. Evid. 702 provides, "If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise."

[9] Fed. R. Evid. 703 provides, "The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by or made known to the expert at or before the hearing. If of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence in order for the opinion or inference to be admitted. Facts or data that are otherwise inadmissible shall not be disclosed to the jury by the proponent of the opinion or inference unless the court determines that their probative value in assisting the jury to evaluate the expert's opinion substantially outweighs their prejudicial effect."

air studies is to prevent an expert from disclosing the prejudicial facts instead of preventing the expert from relying on them altogether. Allowing expert testimony based on the EPA studies "will assist the trier of fact to understand the evidence or to determine a fact in issue" under Rule 702 because the studies may show the propensity of the asbestos-contaminated vermiculite to release asbestos fibers into the ambient air. While the specific asbestos concentration levels discussed in the studies are not relevant because the studies largely measured indoor air releases and gathered data under conditions different from the ambient air releases relevant to the statute, the government's experts should be permitted to opine generally about the friability of Libby asbestos based in part on the data in the studies. The data from the indoor sampling is relevant to the propensity of Libby asbestos to release fibers upon disturbance. Based on these data, an expert could testify about friability and whether a release of asbestos would occur if asbestos-contaminated vermiculite were exposed or disturbed. Because the district court did not inquire into whether the data provided by the indoor air tests is of the type reasonably relied upon by experts in the field, *see* Fed. R. Evid. 703, or whether the data fits under Rule 702, we remand so that the district court can conduct these inquiries in the first instance.

B. W.R. Grace's Historic Product Testing

i. Background

On May 31, 2006, defendants filed a motion in limine to exclude expert opinions regarding Grace's historical, non-ambient air product and commercial testing. Defendants sought to exclude the testimony

of Dr. Richard Lemen,[10] Dr. Vernon Rose,[11] Paul Peronard,[12] Dr. Aubrey Miller,[13] Dr. Chris Weis,[14] and other government witnesses who might "attempt to draw unsupportable correlations between Grace's historical product and commercial tests and expected ambient air exposures from disturbances of vermiculite materials found in the town of Libby." Defs' Mot. in Limine Re: Historic Testing at 4 (Docket # 496). On August 29, 2006, the district court granted defendants' motion to exclude expert testimony based on historic testing offered to prove a release in violation of 42 U.S.C. § 7413(c)(5)(A). Historic Testing Order at 7. The district court denied defendants' motion with respect to expert testimony based on historic testing offered for the purpose of showing defendants' knowledge of the dangerousness of the asbestos contaminated vermiculite. *Id.*

ii. Analysis

Rule 702 authorizes expert testimony that "will assist the trier of fact" when the testimony "is based upon sufficient facts or data," the testimony is produced through "reliable principles and methods," and the expert witness "has applied the principles

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[10] Docket # 287.

[11] Docket # 283.

[12] Docket # 281.

[13] Docket # 279.

[14] Docket # 286.

and methods reliably to the facts of the case." Generally, an inquiry under Rule 702 examines the expert's testimony as a whole. The 702 inquiry typically does not examine the reliability or relevance of particular data sets that underlie the expert testimony, although this approach does no harm where the expert testifies on only one study or where no combination or addition of data could make the data in question a proper, reliable basis for making a given claim. In contrast to Rule 702's holistic focus on an expert's testimony, Rule 703 governs the inquiry into the reliability of particular data underlying expert testimony. Fed. R. Evid. 703; *see also Claar v. Burlington Northern R. Co.*, 29 F.3d 499, 501 (9th Cir. 1994).

Here, the district court excluded the historic testing data under Rule 702. This document-based approach creates the problem that one cannot know fully whether or in what ways other information sources are meant to, in combination with the challenged data sources, form the premise for the expert testimony. Each document must be dispositive under the district court's approach, a requirement we do not impose under Rule 702. On remand, the district court shall conduct the Rule 702 analysis in light of the expert's reasoning and methodology as a whole.

Faced with this new 702 analysis, defendants presumably will argue, as they do on appeal, that the historic testing evidence fails the "fit" test under *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579

(1993).[15] In response, the government argues that its experts do not plan to rely on the historic testing data to estimate the fiber concentrations from the charged releases, but only to opine generally on the hazardous characteristics[16] of Libby asbestos contaminated vermiculite. This limited use of the study to inform experts' opinions is permissible, because the propensity of Libby asbestos to release fibers fits the release element of the knowing endangerment provision. The district court did not consider this propensity-to-release inquiry, thus abusing its discretion by excluding this evidence under 702.

Defendants make two additional, ultimately unsupportable arguments. First, they argue that the testimony's exclusion under Rule 702 was proper because the government's experts "do not need" the evidence on historic air releases to testify about the friability of Libby asbestos. This argument misconceives Rule 702's inquiry, which focuses on fitness, relevance, and reliability, not on whether an expert potentially has other evidence on which to base an opinion. Second, defendants argue that the district court properly excluded the testimony under Rule 403 in addition to Rule 702. Contrary to defendants' assertion, however, the district court did not rely on Rule 403 in its historic testing order but discussed the admissibility of expert testimony only

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[15] This phrasing of the argument improperly focuses the 702 inquiry on a document-by-document approach that we disapproved *supra*.

[16] I.e., the propensity of Libby asbestos to break down and release fibers into the ambient air.

under Rule 702. Moreover, an expert reasonably may rely on inadmissible evidence in forming an opinion or delivering testimony. *See* Fed. R. Evid. 703.

The question remains whether data concerning indoor air quality are of the type reasonably relied on by other experts in the field. *See* Fed. R. Evid. 703. Although it appears that the district court never conducted this 703 inquiry, the second step of the Rule 702 analysis—that the study was "the product of reliable principles and methods"—presumably answers this question in the affirmative. *See* Rule 702; *see also Claar*, 29 F.3d at 501 ("Rule 703 merely relaxes, for experts, the requirement that witnesses have personal knowledge of the matter to which they testify," not whether the requirements of 702 are properly met). Although not stated explicitly, the order implicitly found the historic testing reliable in finding it admissible under 702 to show knowledge. Historic Testing Order at 3-4. Thus, the historic testing is admissible for purposes of expert opinion formation and testimony regarding the propensity of Libby vermiculite to release asbestos as relevant to 42 U.S.C. § 7413(c)(5)(A). Accordingly, we reverse the district court order excluding such testimony.

C. Medical Screening Study: ATSDR and Peipins Publication

i. Background

In 2000-2001, the Agency for Toxic Substances and Disease Registry ("ATSDR") conducted a medical screening study in Libby (the "ATSDR Report") to detect pleural abnormalities in Libby residents and to inform priority-setting in EPA's

asbestos clean-up operation. The study entailed interviewing and medically testing individuals who had lived, worked, attended school, or participated in other activities in Libby for at least six months before 1990. Questions were asked to identify individuals who had accessed potential "exposure pathways" to asbestos and vermiculite prior to December 31, 1990. For example, "pathways" included employment at W.R. Grace, living with W.R. Grace workers, using vermiculite for gardening, and engaging in recreational activities in certain locations known to contain vermiculite. Information about other basic demographic variables and risk factors was also gathered, e.g., age, sex, smoking status, history of pulmonary disease and various other self-reported health conditions.

ATSDR published an initial report of the study's findings in February 2001. The complete results of the study (the "Peipins Publication") were published in November 2003 in *Environmental Medicine*, a peer-reviewed journal. The Peipins Publication analysis used regression modeling to estimate the risk of respiratory abnormalities for each of the exposure pathways while controlling for all other pathways and other established and suggested risk factors.

The study showed that certain factors—including exposure to particular pathways—were associated with respiratory illness and abnormalities. The factors most strongly associated with abnormalities were: being a former W.R. Grace employee, being older, having had household contact with a former W.R. Grace worker, and being male. (The study also demonstrated "a statistically significant increase in the prevalence of pleural abnormalities with an

increasing number of exposure pathways." While "participants reporting more pathways might be expected to have more cumulative exposure than would those reporting fewer pathways," this was not data gathered by the study; the study identified avenues for exposure but did not quantify the duration or intensity of individuals' exposures.

Both the interim ATSDR Report and the final Peipins Publication noted that the study had no control group and "no directly comparable Montana or U.S. population studies [were] available." The researchers were able to compare the data gathered with studies of other groups with substantive work-related asbestos exposure. The levels of pleural abnormalities were higher in Libby than in studies of other groups, but the study did not engage in any direct quantitative comparison.[17]

On May 31, 2006, defendants filed a motion in limine "to exclude expert evidence relating to the ATSDR Medical Testing Program." Defs' Mot. in Limine Re: ATSDR (Docket # 500, 502). The district court characterized the motion as one to exclude "any evidence or expert testimony relating to" the medical screening study conducted in Libby by the Agency for Toxic Substances and Disease Registry. ATSDR Order at 1. The government did not object

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[17] The results of the ATSDR Report were also compared with "control groups or general populations found in other studies." That comparison showed that the levels of pleural abnormalities were also higher in Libby for those who claimed "no apparent exposure" to particular pathways than subjects in other studies. This supported the study's conclusion that it was unlikely that there were individuals in Libby who had not been exposed to some degree.

to the court's characterization of defendants' motion. On August 31, 2006, the district court granted defendants' motion. The court ruled that the ATSDR Report and Peipins Publication, and any expert testimony based thereon, were excluded under Rules 403 and 702 for any purpose relating to the Clean Air Act knowing endangerment counts. *Id.* at 31.

ii. Analysis

The district court acted within its discretion in excluding the ATSDR Report and Peipins Publication themselves under Rule 403 for purposes of the knowing endangerment counts. There are limits to the probative value[18] of the particular correlations the ATSDR Report revealed and potentially prejudicial aspects to the data. Moreover, the government failed to contest the district court's undue prejudice conclusion. Because Rule 403 requires the district court to balance the probative value and the prejudicial effects of a piece of evidence, failure to raise and argue prejudice

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[18] The study demonstrated an association between negative health outcomes and an individual's unquantified exposure to vermiculite via particular "pathways" prior to the statutory period. The existence of association—and not causation—goes to the probative value of the evidence. The reported findings did not indicate that all exposure pathways were significantly associated with lung abnormalities (for example, gardening with vermiculite is not one of the factors mentioned as one being associated with such abnormalities). Because the data were gathered before the statutory period, it is questionable how reliable a basis they provide for drawing conclusions about the extent of the dangers posed by ambient releases during the statutory period, i.e., concentration or duration of releases. However, this is more an issue for the expert than the court.

generally waives the argument. *See United States v. Wilson*, 966 F.2d 243, 245-46 (7th Cir. 1992).

However, in excluding this evidence from informing expert opinion and testimony, the district court erred. The expert is, in the first instance, the judge of what resources would help him to form an opinion, and he can filter out as irrelevant prejudicial information. The trial judge is to assure the reliability of evidence by vetting under Rule 703 the bases underlying the expert's testimony and by examining under Rule 702 the expert's methodology. Here, however, the trial judge misapplied Rule 702 and replaced inappropriately the Rule 703 analysis with one under Rule 403.

To begin, the district court concluded that the ATSDR medical screening program and resulting analyses did not establish a causal link between exposure to Libby's vermiculite and the development of asbestos-related disease. The ATSDR Report acknowledged repeatedly that the testing program was not designed as an epidemiological study to show causality. Notably, there was no internal control group and the participants were self-selected, rather than randomly selected. In light of this, the district court concluded that the data could not provide experts with a reliable basis for opining as to causality (i.e., the danger posed by the releases from Libby vermiculite).

Nonetheless, one of the main objectives of the ATSDR Report was to examine the association between pleural and interstitial abnormalities and participants' exposure histories—measured in broad terms by the participants' overall contact with exposure pathways. As the district court acknowledged, the government's experts did not

claim that they intended to use the study to show causation, but rather indicated that they would rely on the evidence to show that there were some associations or correlations between exposure to vermiculite in Libby and pleural abnormalities.

The district court took the view that the jury would be unlikely to distinguish between evidence of an association and evidence of causation and therefore would likely be misled, and would place undue reliance on the evidence. In this respect, the court substantially underestimated the capacity of jury instructions to distinguish these relationships, and the potential efficacy of a limiting instruction.

Further, the fact that a study is associational—rather than an epidemiological study intended to show causation—does not bar it from being used to inform an expert's opinion about the dangers of asbestos releases, assuming the study is "of the type typically relied upon" by experts in the field. Fed. R. Evid. 703. Of course, the expert's opinion testimony must satisfy the requirements of Rule 702—but that requires consideration of the *overall* sufficiency of the underlying facts and data, and the reliability of the methods, as well as the fit of the methods to the facts of the case. Fed. R. Evid. 702.

Here, the district court failed to consider the Rule 702 requirements with regard to causation. Instead, as with the historical testing, the court conducted a document-by-document Rule 702 analysis that deconstructed the experts' testimony in a manner not contemplated by Rule 702. Moreover, the study, which was published in a peer-reviewed journal and relevant to association, is adequate under 702. The study's failure to establish causation goes to the

weight it should be accorded, but does not mean that an expert could not rely on it in forming an opinion.

Nor did the district court consider the possibility of expert reliance on the ATSDR Report without disclosure of the study itself to the jury, as provided for by Rule 703 ("If of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence in order for the opinion or inference to be admitted."). In fact, the district court generally failed to conduct a 703 analysis, such as considering whether this study was "of the type" relied upon by experts in the field, or whether the ATSDR Report's "probative value ... substantially outweighs [its] prejudicial effect." Fed. R. Evid. 703.

Instead, the district court excluded expert testimony regarding the ATSDR Report under Rule 403. This ruling improperly replaced 703 balancing with 403 balancing, *cf.* Fed. R. Evid. 703 (providing balancing test applicable to expert testimony), and the exclusion of the ATSDR Report and Peipins Publication as bases for expert testimony or opinion formation was error. While Rule 403 supplies a basis for holding the underlying ATSDR Report inadmissible, it does not contemplate barring an expert from relying on it. *Cf.* Fed. R. Evid. 403. The exclusion of the ATSDR Report and the Peipins Publication from expert consideration and testimony was error, and thus we reverse that part of the ATSDR Order.

V. Motion to Strike

In its reply brief to this court, the government submitted six documents not included in the record below—two excerpts of the federal register (addenda 1 and 3), a report of the National Research Council

(addendum 2), published scientific articles (addenda 5 and 6), and search results presumably from the CAS Registry (addendum 4). Defendants moved to strike four of the documents (addenda 2, 4, 5, and 6) on the grounds that they were not part of the record below, were misleading, and, by virtue of their submission in the reply brief, were presented without giving defendants an opportunity to respond.

In general, we consider only the record that was before the district court. We have made exceptions to this general rule in three situations: (1) to "correct inadvertent omissions from the record," (2) to "take judicial notice," and (3) to "exercise inherent authority ... in extraordinary cases." *Lowry v. Barnhart*, 329 F.3d 1019, 1024 (9th Cir. 2003). Considerations of institutional expertise and notice support our limitation of these exceptions to "unusual circumstances." *Id.*

The search results in addendum item 4 fit none of these exceptions. Addendum items 2, 5, and 6 fit within the second exception—we have discretion to take judicial notice under Rule 201 of the existence and content of published articles. *See Bell Atlantic Corp. v. Twombly*, ___ U.S. ___, ___ n.13, 127 S. Ct. 1955, 1973 n.13 (2007); *United States v. Rutgard*, 116 F.3d 1270, 1278 (9th Cir. 1997). However, as we have stated before, the appropriate manner to supplement the record on appeal is "by motion or formal request so that the court and opposing counsel are properly apprised of the status of the documents in question." *Lowry*, 329 F.3d at 1025. The government failed to so move, and thus we grant defendants' motion to strike. However, due to the reversal and remand on certain issues, our ruling

here does not preclude application to the district court for inclusion in the district court's record for whatever use is appropriate.

CONCLUSION

We reverse the order dismissing the knowing endangerment object of Count I of the superseding indictment. We reverse the order adopting the regulatory definition of asbestos used for civil regulation and direct that the definition in the criminal statute, i.e., the definition provided in 42 U.S.C. § 7412(b), applies. We grant the government's request for a writ of mandate. We affirm the exclusion of the indoor air studies, the ATSDR Report, and the Peipins Publication themselves. However we reverse their exclusion—and the exclusion of the historic testing—as bases underlying an expert's opinion or testimony. Finally, we grant defendants' motion to strike the documents included with the government's reply brief to this court.

AFFIRMED in part, **REVERSED** in part, and **REMANDED**.

WRIT OF MANDAMUS GRANTED on one issue.

APPENDIX B

DENIAL OF REHEARING EN BANC

Filed
Dec 05, 2007
Cathy A. Catterson,
Clerk
U.S. Court of Appeals

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, *Plaintiff-Appellant,* v. W.R. GRACE; ALAN R. STRINGER; HENRY A. ESCHENBACH; JACK W. WOLTER; J. MCCAIG; ROBERT J. BETTACCHI; O. MARIO FAVORITO; ROBERT C. WALSH, *Defendants-Appellees.*	No. 06-30472 D.C. No. CR-05-00007-DWM

UNITED STATES OF AMERICA, *Plaintiff-Appellant,* v. W.R. GRACE; ALAN R. STRINGER; HENRY A. ESCHENBACH; JACK W. WOLTER; WILLIAM MCCAIG; ROBERT J. BETTACCHI; O. MARIO FAVORITO; ROBERT C. WALSH, *Defendants-Appellees.*	No. 06-30524 D.C. No. CR-05-00007-DWM

Before: B. FLETCHER, PREGERSON, and FERGUSON, Circuit Judges.

Judge Pregerson has voted to deny the petitions for rehearing en banc and Judges B. Fletcher and

Ferguson so recommend.

The full court has been advised of the petitions for rehearing en banc and no judge has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35.

The petitions for rehearing en banc are denied.

APPENDIX C

DISTRICT COURT OPINION-ORDER ON MOTIONS IN LIMINE

Filed
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2006 Aug 7 AM 10:54
PATRICK E. DUFFY
By: _____
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IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MONTANA MISSOULA DIVISION

UNITED STATES OF AMERICA, *Plaintiff* vs.	)	CR 05-07-M-DWM
W.R. GRACE, ALAN R. STRINGER, HENRY A. ESCHENBACH, JACK W. WOLTER, WILLIAM J. MCCAIG; ROBERT J. BETTACCHI; O. MARIO FAVORITO, ROBERT C. WALSH, *Defendants.*	)	ORDER

I. Introduction

The difficult question presented now is what the Congress meant when it used the term "asbestos." How the word is defined has significant legal ramifications in this criminal case. The definition of "asbestos" sets the parameters of the Clean Air Act's criminal prohibitions and affects the likelihood that alleged conduct in this case will be deemed criminal. If the word "asbestos" as applied in the criminal law includes varieties of winchite and richterite the

criminal case involved here is dramatically different than if "asbestos" is defined as the phrase has historically been used by every governmental regulatory agency to address the issue.

The issue gets resolved through motions in limine filed by all parties seeking a ruling on the definition of the term "asbestos" as it appears in the Clean Air Act, 42 U.S.C. § 7412(b)(1).[1] The government urges the Court to adopt a broad reading of the term to include all of the minerals comprising what the government calls "Libby amphibole." The Defendants argue that the proper definition is the narrower one set forth in the regulations implementing the Clean Air Act, which excludes the minerals that comprise the majority of the amphibole found in Libby. For the reasons that follow, I find that the limited definition advocated by the Defendants applies to the Clean Air Act offenses charged in this case.

II. Background

The Superseding Indictment alleges that the vermiculite mined in Libby was contaminated with amphibole asbestos "composed of a family of closely related minerals including tremolite, winchite, richterite, actinolite and others." Superseding

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[1] The motions at issue are the government's Motion in limine # 2 to Exclude Evidence and Argument that Defendants Were Regulated by the Clean Air Act's NESHAPs Program (Doc. No. 462) and the Defendants' Joint Motion in limine to Exclude Evidence Based on Sample Results Indicating the Presence of Fibers from Minerals that do not Constitute "Asbestos" Under the Clean Air Act (Doc. No. 474, filed by Defendant Bettacchi on behalf of all Defendants).

Indictment (Doc. No. 590) at ¶4. According to the Superseding Indictment, "[t]his amphibole asbestos has been commonly called 'tremolite.'" *Id.* However, the United States Geological Survey (USGS), working in conjunction with the Environmental Protection Agency (EPA) on the Libby clean-up, analyzed the amphibole at the Libby mine and concluded that "approximately 84% of the amphiboles can be classified as winchite, 11% as richterite, and 6% as tremolite." Exhibit C to Supplemental Expert Witness Disclosure of Gregory P. Meeker, p. 1959.

The EPA acknowledged the reality on the ground in Libby when its Office of Air Quality Planning and Standards issued a report titled *Action Plan: Air Emission from Sources of Contaminant Asbestos.* The report states on page 2: "The asbestiform minerals found at the Libby, MT site were originally thought to be tremolite asbestos, but more specifically may be the asbestiform varieties of winchite and richterite, neither of which is regulated explicitly by any EPA regulation."

The Defendants are charged in Counts II through IV of the Superseding Indictment with violating the Clean Air Act's knowing endangerment provision.[2] The knowing endangerment offense is codified at 42 U.S.C. § 7413(c)(5)(A), which provides in part:

> Any person who knowingly releases into the ambient air any hazardous air pollutant

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[2] Defendant Grace is charged alone in Count II; Counts III and IV name Defendants Grace, Stringer, Wolter and Bettacchi. Superseding Indictment at ¶¶ 185-190.

> listed pursuant to section 7412 of this title or any extremely hazardous substance listed pursuant to section 11002(a)(2) of this title that is not listed in section 7412 of this title, and who knows at the time that he thereby places another person in imminent danger of death or serious bodily injury shall, upon conviction, be punished by a fine under Title 18, or by imprisonment of not more than 15 years, or both.

Section 7412(a)(6) defines "hazardous air pollutant" as "any air pollutant listed in [Section 7412(b)]." Section 7412(b)(1) provides a compendium of hazardous air pollutants listed by their chemical names and in most cases accompanied by the corresponding Chemical Abstract Services (CAS) number. Included on the list is "Asbestos," along with its CAS number 1332214.

Although the criminal knowing endangerment provision of 42 U.S.C. § 7413(c)(5)(A) refers to § 7412 for its list of proscribed pollutants, § 7412 is not a criminal statute. It is part of a civil regulatory scheme intended to set emissions standards for certain regulated sources of pollution. Following the 1990 Amendments to the Clean Air Act, EPA was required to identify categories of sources[3] for each of

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[3] There are two types of sources relevant to this discussion. A "major source" is

> any stationary source or group of stationary sources located within a contiguous area and under common control that emits or has the potential to emit considering controls, in the aggregate, 10 tons per year or more of any hazardous air pollutant or 25 tons per year or

the pollutants listed in § 7412(b)(1). Congress then directed EPA to promulgate regulatory emissions standards for all major sources and for those selected area sources which EPA determines present a threat of adverse health effects. 42 U.S.C. § 7412(a)(1)-(3), (c)(1)-(3), (d)(1). These standards are known as National Emissions Standards for Hazardous Air Pollutants, or NESHAPs. This statutory command was accompanied by a savings provision at 42 U.S.C. § 7412(q)(1), which clarified that pre-existing regulatory standards in effect under the prior version of the section would remain in effect following the 1990 Amendments.

One such pre-existing standard was set forth in regulations established in response to the enactment of the Clean Air Act of 1970. The regulations, established in 1973, set emissions standards for asbestos. 38 Fed. Reg. 8820, 8826 (April 6, 1973). The regulations include a definition of asbestos for purposes of § 7412 of the Clean Air Act that has been substantially unchanged since 1973 and was in effect at the time of the 1990 Amendments to the Act. The definition is codified at 40 C.F.R. § 61.141 and states: "*Asbestos* means the asbestiform varieties of serpentinite (chrysotile), riebeckite (crocidolite), cummingtonite-grunerite, anthophyllite, and

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more of any combination of hazardous air pollutants.

42 U.S.C. § 7412(a)(1).

An "area source" is "any stationary source of hazardous air pollutants that is not a major source." 42 U.S.C. § 7412(a)(2).

actinolite-tremolite."[4] Section 61.141 appears under the heading "Subpart M-National Emission Standard for Asbestos." Also under that heading is 40 C.F.R. § 61.140, which states: "The provisions of this subpart are applicable to those sources specified in §§ 61.142 through 61.151, 61.154, and 61.155." The parties agree that Defendant Grace's Libby mine was not a regulated source under § 61.140 and was therefore not subject to the civil regulatory emissions standards established under that subpart.

The Defendants argue that § 61.141's six-species definition of asbestos is nonetheless applicable in this case because that regulation interprets § 7412(b)(1), which in turn supplies the identification of hazardous air pollutants for § 7413(c)(5)(A), the section defining the criminal offense. The United States argues that the six-species definition should not apply because it appears in a civil regulation and therefore cannot be relied upon to define the content of a criminal offense. The parties have attempted to force a resolution of this dispute once before, but the Court deferred consideration of the matter until trial. *See United States v. W.R. Grace,* 429 F. Supp. 2d 1207, 1238 (D. Mont. 2006).

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[4] Similar definitions of "asbestos" appear elsewhere in the regulatory state, including: 29 C.F.R. § 1910.1001 (adopted by OSHA); 30 C.F.R. § 71.702(a) (adopted by MSHA); 16 C.F.R. § 1304.3(b) (adopted by CPSC); and 40 C.F.R. § 763.163 (adopted by EPA). Also, Congress similarly defined "asbestos" in the Asbestos Hazard and Emergency Response Act ("AHERA"), 15 U.S.C. § 2642(3), enacted in 1986.

Since then, the parties' expert disclosures have revealed that each side intends to present expert testimony that assumes that the legal definition of "asbestos" for purposes of the Clean Air Act will be the one it favors. The government's witnesses intend to give opinions on the dangers of "Libby amphibole," the composite of all minerals found in Libby including winchite and richterite.[5] The Defendants have retained expert witnesses who intend to testify that winchite and richterite are not regulated by any federal agency.[6] If the legal dispute is left unresolved, the jurors will hear lengthy and potentially confusing testimony from two distinct sets of experts offering opinions based on different standards which cannot both be correct. How asbestos is defined is a legal question that when answered will dictate the nature and kind of proof that can be presented to the jury.

III. Analysis

A. Legal standard

The pending motions present a question of statutory construction. Because this is an issue of statutory construction, the parties' extensive citation to one another's historical positions on the interpretation and applicability of the emissions

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[5] *See* for example expert witness disclosures for government witnesses Gregory P. Meeker, James Millette, Christopher Weis and Aubrey Miller.

[6] *See* for example expert witness disclosures for defense witnesses Charles Blake, Arthur Langer, Elizabeth Anderson, Joseph Rodricks, Mickey Gunter, Richard Lee, Fred Pooley and John Addison.

regulations is not helpful. Evidence of a party's previously adopted interpretation, whether it be the government or the Defendants, is no use in determining what Congress intended in enacting 42 U.S.C. § 7413(c)(5)(A). In this regard, allegations that a party is attempting to "have it both ways" are particularly inapposite, as the canons of statutory construction do not employ principles of estoppel.

In interpreting a criminal statute to determine what it means, courts must look first to the language of the statute, and second to the legislative history of the law. *United States v. Weitzenhoff*, 35 F.3d 1275, 1283 (9th Cir. 1994). A court should seek to "give effect to the plain, common-sense meaning of the enactment without resorting to an interpretation that defies common sense." *United States v. Bonilla-Montenegro*, 331 F.3d 1047, 1051 (9th Cir. 2003) (internal quotation marks omitted). The plain language of the statute is to be ignored only when a literal interpretation of the statute would thwart the purpose of the statutory scheme and lead to an absurd result. *County of Santa Cruz v. Cervantes*, 219 F.3d 955, 960 (9th Cir. 2000). Courts should also reject any interpretation that would render another statutory provision surplusage or a nullity. *Id.* at 961. Resort to the legislative history for aid in interpreting a statute is only appropriate when the terms of the statute are ambiguous. *Burlington N. R.R. Co. v. Oklahoma Tax Comm'n*, 481 U.S. 454, 461 (1987) ("Unless exceptional circumstances dictate otherwise, when we find the terms of a statute unambiguous, judicial inquiry is complete." (internal quotation marks omitted)).

When a criminal statute's meaning remains ambiguous after application of the rules of statutory

construction, the rule of lenity requires that the law be interpreted to cover only conduct that clearly falls within its scope. *United States v. Lanier*, 520 U.S. 259, 266 (1997); *United States v. Shabani*, 513 U.S. 10, 17 (1994).

B. Discussion

1. The Court's prior CERCLA Order

The government first argues that this Court has already decided the matter at issue during the EPA's civil enforcement action against Grace. The government cites the March 9, 2001 Order in which the Court wrote, "The Action Memorandum demonstrates a 'reasonable basis' to believe that asbestos contamination is a problem in Libby. The conclusion is as plain to see as the East Front of the Rocky Mountains." *United States v. Grace*, 134 F. Supp. 2d 1182, 1188 (D. Mont. 2001). The government argues that because this finding was "not limited to one of the six commercial types of asbestos," Govt.'s Br. (Doc. No. 462) at p. 5, it constitutes a finding that all of the "Libby amphibole," including winchite and richterite, is asbestos for purposes of the Clean Air Act.

The flaws in the government's argument are self-evident. The 2001 Order was issued in the context of a civil clean-up action under the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA). It did not consider or rule upon any provision of the Clean Air Act, particularly the criminal part of that law. Moreover, the language of the opinion is an analysis of whether the EPA had a reasonable basis to believe there may have been at the time a "release or threat of release of a hazardous substance or pollutant or contaminant" under CERCLA, 42 U.S.C.

§ 9604(e)(5)(B). CERCLA defines "pollutant or contaminant" very broadly to include, but not be limited to:

> [A]ny element, substance, compound, or mixture, including disease-causing agents, which after release into the environment and upon exposure, ingestion, inhalation, or assimilation into any organism, either directly from the environment or indirectly by ingestion through food chains, will or may reasonably be anticipated to cause death, disease, behavioral abnormalities, cancer, genetic mutation, physiological malfunctions (including malfunctions in reproduction) or physical deformations, in such organisms or their offspring ....

42 U.S.C. § 9601(33). Given this broad definition, it is clear that the Court could have found that EPA had a rational basis for its belief that there was a present threat of a release of a hazardous pollutant or contaminant without necessarily finding that winchite and richterite are "asbestos" for purposes of the Clean Air Act. The CERCLA statute strives to clean and restore the environment. The criminal part of the Clean Air Act seeks to establish culpability for harmful events in the environment that cause serious risks to the well being of humans.

2. Interpretation of 42 U.S.C. §§ 7413(c)(5)(A) and 7412(b)(1)

Section 7413(c)(5)(A) poses a difficult interpretative challenge because it draws its definition of "hazardous air pollutant" from § 7412, which is a civil regulatory statute. The matter is complicated by the existence of a NESHAP Program regulation promulgated under § 7412 that defines

"asbestos." Normally, an implementing regulation is a legitimate place to search for clarification of the meaning of a statute. On the other hand, the language of § 7412(b)(1) includes not just the word asbestos but also a corresponding CAS number, suggesting that Congress felt the proper path to an interpretation runs through the CAS registry. Regardless of which path one follows, the conclusion is an ambiguous statute that must be construed so that it criminalizes only conduct that is clearly prohibited.

If reading the Clean Air Act's criminal knowing endangerment provision is confined to the text of the statute, the reader is left with a general description of "asbestos" as one of the prohibited hazardous air pollutants. The government urges the Court to confine its reading of the statute to that single word definition, which would make the jury's finding regarding this element dependent entirely on expert testimony as to what minerals constitute asbestos. But as is clear from reading the CAS registry (discussed in greater detail below), the Code of Federal Regulations, and the many expert disclosures filed in this case, there is not a consensus on the definition of asbestos. A defendant on trial for releasing "asbestos" would be apprehensive about the prospect of his fate turning on which expert the jury found most persuasive in describing which minerals fall within the scope of the criminal offense. More problematic is that disputed expert testimony would define an element of the offense, a matter that is the province of the court. Thus, § 7412(b)(1)'s use of the term "asbestos" fails to provide the requisite fair warning about what conduct is considered criminal. *See Lanier*, 520 U.S. at 266-267.

But the text of the statute is not all there is to go on in determining what conduct has been proscribed. The regulations implementing § 7412 provide the six-species definition of asbestos advocated by the Defendants. The government argues that reference to the regulations is inappropriate because "this is not a NESHAPs case." Govt.' s Reply Br. at p. 2. The argument is correct on that point, and the Defendants have not argued otherwise. Even so, this is not a civil case either, yet § 7413(c)(5)(A) relies upon a civil regulatory statute (§ 7412(b)(1)) for its listing of hazardous air pollutants. The conundrum the government must explain is why reliance on a civil statute is permissible but reliance on a civil regulation is not.

The answer from the government is that the regulatory definition does not apply because it is part of a regulatory scheme that did not govern Grace's Libby operation. Because the Libby amphibole is a contaminant in the vermiculite mined by Grace, the Libby mine was not a regulated source under the NESHAPs Program. 40 C.F.R. § 61.140. As a result, the government argues, the definition of asbestos supplied in the NESHAPs regulations does not apply to this case. The Defendants point out that the government's position would give the word "asbestos" two different meanings within the same statute. If the release comes from a regulated source under 40 C.F.R. § 61.140, then the substance released is asbestos only if it is one of the six species listed in 40 C.F.R. § 61.141. If on the other hand the same substance is released from an unregulated source such as the Libby mine, then, according to the government, the definition of asbestos is broader. The government does not clarify the boundaries of

this "broader" definition, except to say that it includes winchite and richterite.

To bolster its argument the government notes that Congress, in enacting AHERA in 1986, included the six-species definition within the text of the statute. According to the government, AHERA shows that when Congress means for the six-species definition of asbestos to apply, it is capable of saying so in the statutory text. This argument fails to account for the fact that there were Clean Air Act regulations adopting the six-species definition of "asbestos" in place at the time of the 1990 Amendments to the Act. That regulatory definition remained in effect after the 1990 Amendments pursuant to the savings provision in § 7412(q)(1).[7] So while Congress did not expressly define "asbestos" in the text of the statute as it did in AHERA, Congress did expressly adopt the existing regulatory standards, including the definition of "asbestos" found at 40 C.F.R. § 61.141. Congress also adopted the regulatory language limiting the applicability of the NESHAPs Program to a list of sources that does not include Grace's Libby operation. *See* 40 C.F.R. § 61.140.

Statutory ambiguity exists when a single-word definition of a hazardous air pollutant can have two different meanings depending on the manner of the

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[7] 42 U.S.C. § 7412(q)(1) provides in part: "Any standard under this section in effect before the date of enactment of the Clean Air Act Amendments of 1990 [Nov. 15, 1990] shall remain in force and effect after such date unless modified as provided in this section before the date of enactment of such Amendments or under such Amendments."

release. The government wants to ignore the NESHAPs regulations because they are not part of the statute. The problem with that argument is that § 7412 contemplates and in fact requires that regulations be promulgated to establish national emissions standards. 42 U.S.C. § 7412(a)(1)-(3), (c)(1)-(3), (d)(1). Without the regulations § 7412(b)(1)' s listing of hazardous air pollutants is meaningless. Absent reference to the regulations a citizen is left with no guidance about prohibited conduct except the unsatisfactory one-word definition of asbestos in § 7412(b)(1). The statute creates an ambiguity. Section 7412's reference to "asbestos" does not provide fair notice as to which minerals are hazardous air pollutants; the statute's implementing NESHAPs regulations provide a definition, but the civil regulatory nature of the NESHAPs Program renders the applicability of the regulations questionable in the criminal context.

Reliance upon the CAS number for asbestos provides no greater clarity. Section 7412(b)(1) includes CAS numbers for nearly every pollutant listed in that section. Of the few pollutants lacking CAS numbers, the statute provides definitions for all but one. This leads to an inference that the CAS number is intended to serve a definitional function in § 7412(b)(1).

The Chemical Abstract Service is a division of the American Chemical Society. The CAS registry itself is a privately maintained database that cannot be directly accessed unless a fee is paid. The United States points out much of the database's content appears to be available on the EPA's website. Each CAS registry entry consists of a list of information fields for each entry. Information fields include

"CAS Registry Number," "Chemical Name," "Molecular Formula," "Heading Parent," "Definition," and many others.

The "Definition" field for the entry found at the CAS registry number for asbestos (1332214) gives the following definition for asbestos: "A grayish, noncombustible fibrous material. It consists primarily of impure magnesium silicate minerals."[8] The government argues that this is where the inquiry should end because the definition is sufficient to put the Defendants on notice as to what conduct is prohibited. The government is correct that the written definition provided in the CAS entry is more detailed than § 7412(b)(1)' s simple reference to "asbestos," but it does not follow that the more detailed definition provides fair notice in the sense that it clearly encompasses the minerals winchite and richterite. To the contrary, further examination of the CAS classification system suggests that winchite and richterite do not fall within the registry's definition of asbestos.

Each of the six minerals included in the regulatory definition of asbestos has a separate entry in the CAS registry under its own unique CAS number. In each of those entries, the "heading parent" is listed as "asbestos," followed by a listing of the name of the individual mineral.[9] The CAS

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[8] *See* Attachment 2 to Govt.'s Reply Br. (Doc. No. 631). This document belies the Defendants' contention that the CAS entry for asbestos does not include a definition.

[9] The following are excerpts from the relevant listings (the field "NM" stands for "Name Modification"):

For chrysotile:

For grunerite:

registry includes several separate listings that contain the terms "winchite" and "richterite." Unlike the CAS entries for the six species listed in the NESHAPs regulations, none of the entries for winchite and richterite lists asbestos as the heading parent, nor does the term "asbestos" appear elsewhere in the entries relating to those two minerals. Instead, the heading parent for each entry is listed as "winchite" or "richterite." *See* Attachments 11-15 to Exhibit 1 to Defs.' Resp. Br. (Doc. No. 581).

MOLECULAR FORMULA: Unknown
CA NAME(S):
HP=Asbestos
NM=chrysotile
OTHER CA NAMES:
HP=Chrysotile asbestos

For crocidolite/riebeckite:

MOLECULAR FORMULA: Unknown
CA NAME(S):
HP=Asbestos
NM=crocidolite
OTHER CA NAMES:
HP=Crocidolite asbestos
HP=Crocidolite
HP=Asbestos
NM=riebeckite
HP=Asbestos
NM=magnesioriebeckite
HP=Riebeckite

For anthophyllite:

MOLECULAR FORMULA: Unknown
CA NAME(S):
HP=Asbestos
NM=anthophyllite
OTHER CA NAMES:
HP=Anthophyllite asbestos

MOLECULAR FORMULA: Unknown
CA NAME(S):
HP=Asbestos
NM=grunerite
OTHER CA NAMES:
HP=Amosite asbestos

For tremolite:

MOLECULAR FORMULA: Unknown
CA NAME(S):
HP=Asbestos
NM=tremolite
OTHER CA NAMES:
HP=Tremolite asbestos

For actinolite:

MOLECULAR FORMULA: Unknown
CA NAME(S):
HP=Asbestos
NM=actinolite
OTHER CA NAMES:
HP=Actinolite asbestos

Attachments 2-7 to Exhibit 1 to Defs.' Resp. Br. (Doc. No. 581).

A thorough examination of the CAS registry provides strong clues that winchite and richterite are not included in the CAS definition of asbestos. The government argues that any CAS entry other than the one for "asbestos" under the number listed in § 7412(b)(1) is irrelevant. I disagree. The issue here is what the statute tells an actor about the scope of illegal conduct. It is a question of fair notice. Here the statute refers to a private registry that is not likely to be discovered or examined except by a sophisticated actor. Upon finding the entry for asbestos there is a general definition but no clarification with respect to which minerals are included within that definition. It is a fair inference that such a sophisticated actor might then investigate further within the registry in hopes of learning more about the scope of the criminal offense. When he does so, he finds information suggesting that the six species listed in 40 C.F.R. § 61.141 are considered asbestos, while winchite and richterite are not.

What matters is that this reading of § 7412(b)(1) is not implausible. From the guidance that Congress has given, a person could reasonably conclude that releases of winchite and richterite are not illegal under the Clean Air Act's knowing endangerment provision. That conclusion would appear even more reasonable to an actor who seeks clarification in the implementing regulations and finds a definition of "asbestos" that coincides with the six species having the heading parent "asbestos" in the CAS registry. From this finding follows the inescapable conclusion that §§ 7413(c)(5)(A) and 7412(b)(1) do not clearly place interested parties on notice of the illegality of releases of winchite and richterite. A court violates due process when it attempts to apply "a novel

construction of a criminal statute to conduct that neither the statute nor any prior judicial decision has fairly disclosed to be within its scope." *Lanier*, 520 U.S. at 266.

The Defendants ask the Court to invoke the rule of lenity. The Supreme Court applied the rule of lenity in a case involving an earlier version of the Clean Air Act. Addressing a question of statutory interpretation, the Court wrote:

> At the very least, it may be said that the issue is subject to some doubt. Under these circumstances, we adhere to the familiar rule that, where there is ambiguity in a criminal statute, doubts are resolved in favor of the defendant.

Adamo Wrecking v. United States, 434 U.S. 275, 284-285 (1978) (citations, internal quotation omitted).

The Supreme Court's language describes the situation in this case. The Clean Air Act's knowing endangerment provision sends an actor in two different directions in search of a definition of the hazardous air pollutant asbestos. One leads to a highly technical, privately maintained chemical database that fails to clarify what minerals are covered. The other requires reference to a civil regulatory scheme that does not apply to all releases and has never governed releases from the Libby mine. A reasonable person who searches both the CAS registry and the NESHAPs regulations could fairly conclude that winchite and richterite are not covered by § 7412(b)(1); neither the statute, the regulations, or the CAS registry explicitly includes those minerals in the definition of "asbestos." It must then be said that the definition of "asbestos"

for purposes of the Clean Air Act's knowing endangerment offense is subject to some doubt.

That doubt must be resolved in favor of the Defendants, which means that the statute must be construed to apply "only to conduct clearly covered." *Lanier*, 520 U.S. at 266. The conduct clearly covered by § 7413(c)(5)(A) is the knowing release of any of the six species of asbestos listed in 40 C.F.R. § 61.141 and appearing under the heading parent "asbestos" in the CAS registry, i.e., the asbestiform varieties of serpentinite (chrysotile), riebeckite (crocidolite), cummingtonite-grunerite, anthophyllite, and actinolite-tremolite. This is the definition upon which the jury will be instructed at trial.

3. Admissibility of the government's sampling data and expert testimony

The Defendants request sweeping evidentiary rulings based on the Court's construction of §§ 7413(c)(5)(A) and 7412(b)(1). It is my sense that specific rulings are best delayed until the Court has an opportunity to consider the foundation for each piece of evidence or opinion testimony. This may occur through the consideration of other pending motions in limine or through the attempted introduction of evidence at trial. It is clear from the record, however, that some portion of the government's sampling data and expert testimony is inadmissible. At a minimum, any sampling data that commingles the minerals making up what the government calls "Libby amphibole," without differentiating between minerals covered by the Clean Air Act and minerals not covered, is inadmissible under Fed. R. Evid. 403.

There is an intolerable risk of unfair prejudice should the government be allowed to put on expert after expert testifying that the Defendants endangered others through the release of a deadly composite of minerals without stating with any certainty what percentage of the minerals released are covered by the criminal statute under which the Defendants are charged. The Defendants in that case would be left in the position of having to argue to the jury that although the proof shows that people were endangered by a release of the potentially deadly minerals winchite and richterite, no crime results because the statute does not cover the minerals released. In light of the comparatively low percentage of covered minerals present in the "Libby amphibole," the probative value of such undifferentiated sampling is far outweighed by the prejudicial effect of the evidence. Expert testimony based on undifferentiated samples is probably inadmissible under Fed. R. Evid. 702 and the relevance prong of *Daubert* because it does not "fit" the facts of the case. *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 591-593 (1993).

IV. Order

Based on the foregoing, IT IS HEREBY ORDERED that the government's Motion in limine # 2 to Exclude Evidence and Argument that Defendants Were Regulated by the Clean Air Act's NESHAPs Program (Doc. No. 462) is DENIED.

IT IS FURTHER ORDERED that the Defendants' Joint Motion in limine to Exclude Evidence Based on Sample Results Indicating the Presence of Fibers from Minerals that do not Constitute "Asbestos" Under the Clean Air Act (Doc. No. 474) is GRANTED insofar as the definition of

"asbestos" for purposes of the Clean Air Act Counts (Counts II through IV) is limited to the asbestiform varieties of serpentinite (chrysotile), riebeckite (crocidolite), cummingtonite-grunerite, anthophyllite, and actinolite-tremolite.

IT IS FURTHER ORDERED that evidentiary rulings based on this Order will be made on a case-by-case basis in subsequent orders resolving pending motions in limine, or at trial.

DATED: this 7th day of August, 2006.

/s/
DONALD W. MOLLOY, Chief Judge
United States District Court

APPENDIX D

DISTRICT COURT OPINION - ORDER ON MOTION TO DISMISS COUNT 1 OF THE SUPERSEDING INDICTMENT

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MONTANA MISSOULA DIVISION

UNITED STATES OF AMERICA, *Plaintiff,* vs.	CR 05-07-M-DWM
W.R. GRACE, ALAN R. STRINGER, HENRY A. ESCHENBACH, JACK W. WOLTER, WILLIAM J. MCCAIG; ROBERT J. BETTACCHI; O. MARIO FAVORITO, ROBERT C. WALSH, *Defendants.*	ORDER

I. Introduction[1]

The Defendants have filed a motion to dismiss the knowing endangerment object of Count I of the Superseding Indictment. The Defendants contend that the Superseding Indictment does not cure the defect found in the original Indictment. Based on this premise the argument is put forth that the Superseding Indictment is therefore invalid under

[1] The facts of this case are well known to the Court and the parties and will not be recited here except where necessary.

the Court's analysis in its June 8, 2006 Order. That Order dismissed the knowing endangerment object of the Count I conspiracy in the original Indictment. Defendants also argue that re-prosecution of the knowing endangerment object of the Count I conspiracy is barred because that object was dismissed with prejudice by the earlier order. Although they do not expressly raise the point in their briefing, the Defendants offered the statute of limitations as an additional basis for dismissal during oral argument. The government contends that the use of the "with prejudice" language does not bar re-prosecution and further argues that 18 U.S.C. § 3288 allows a six-month window in which the government may re-allege the knowing endangerment object, regardless of whether the statute of limitations has run. The government is correct about the significance of the "with prejudice" language but its view of the nostrum of amendment is at odds with the statute of limitations. The remedy of a superseding indictment does not work with the facts of this particular case.

II. Background

The Court granted the Defendants' motion to dismiss the Clean Air Act knowing endangerment object of the Count I conspiracy in this case on June 8, 2006.[2] In my Order, I stated, "the knowing

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[2] Count I alleges that it was an object of the conspiracy

> To knowingly release and cause to be released into the ambient air a hazardous air pollutant, namely asbestos, and at the time knowingly placed persons, including: families of employees of W.R. GRACE Libby vermiculite mining and processing operations;

endangerment object of Count I (Indictment ¶ 71(a)) is DISMISSED WITH PREJUDICE as time-barred under the statute of limitations." *United States v. W.R. Grace*, 434 F. Supp. 2d 879, 888 (D. Mont. 2006). The government then obtained a Superseding Indictment a bit over two weeks later on June 26, 2006 (Doc. No. 590). The Superseding Indictment contains relatively few changes. This motion involves the alterations to Paragraphs 173-183. These paragraphs, and in particular Paragraph 175, were the focus of the June 8 analysis in deciding whether the original Indictment had alleged an act in furtherance of the knowing endangerment prong of the conspiracy charge within the limitations period.[3] The paragraphs as pled in the original

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> residents of Libby, Montana and surrounding communities in Lincoln County; and others in imminent danger of death or serious bodily injury in violation of 42 U.S.C. § 7413(c)(5)(A).

Indictment at ¶ 71(a).

[3] The June 8, 2006 Order states:

> The lone remaining allegation, contained in Paragraph 175, poses a more difficult question. That paragraph alleges that Defendants Grace and Stringer led EPA officials and others to contaminated cites in and around Libby without disclosing the nature of the contamination. The Defendants are alleged to have been aware of the toxicity and friability of tremolite, and are alleged to have known of its presence at each of the sites visited in Paragraph 175. It is therefore possible to conclude that by bringing unknowing individuals onto the properties in question, the Defendants are alleged to have knowingly brought about a scenario whereby endangerment could occur under the

Indictment described acts of *concealment* but did not allege acts of *endangerment*.

The pending motion challenges the substance of the new allegations. The changes in the Superseding Indictment try to recast Paragraphs 173-183 as descriptions of acts in furtherance of both the defrauding object and the knowing endangerment object alleged in the Count I conspiracy. Toward this end the Superseding Indictment contains an amended heading for the section of the charging document in which Paragraphs 173-183 appear. In the original Indictment that section was headed "Obstruction of EPA's Superfund Clean-Up." The corresponding section in the Superseding Indictment is headed "Knowing Endangerment of EPA Employees and the Libby Community and Obstruction of EPA's Superfund Clean-Up." The

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> government's theory. Nonetheless, under an objective reading of Paragraph 175, and taking into account the other paragraphs included under the "Obstruction of EPA's Superfund Clean-Up" subheading, it is more plausible that the acts alleged were done in furtherance of the defrauding object. The crux of the allegation in Paragraph 175 is the failure to be fully truthful with the authorities. A fair reading of the Indictment compels the conclusion that the point of the alleged wrongful conduct in that paragraph was not to endanger EPA officials, but rather to mislead them. Although the acts alleged in Paragraph 175 may have resulted in prolonged endangerment, I cannot conclude that the paragraph alleges acts done in furtherance of the knowing endangerment object when the language and context of the paragraph so clearly suggest another purpose.

Grace, 434 F. Supp. 2d at 888.

alterations to Paragraphs 173, 174, 176-180, 182 and 183 are uniform.[4] In each case the Superseding Indictment offers the same factual allegation as alleged in the corresponding paragraph of the original Indictment, followed by the new phrase, "thereby concealing the true hazardous nature of the asbestos contamination, delaying EPA's investigation and causing releases of asbestos into the air in the Libby community." [5]

Paragraph 175 is amended in a manner different from the others. In the original Indictment Paragraph 175 alleged:

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[4] Paragraph 181 is unchanged.

[5] For instance, Paragraph 173 of the original Indictment alleged:

> On or about November 23, 1999, defendants W.R. GRACE and STRINGER told the EPA On-Scene Coordinator that Libby Mine vermiculite concentrate at the Export Plant and at the Screening Plant contained less than one percent tremolite asbestos.

Paragraph 173 of the Superseding Indictment reads:

> On or about November 23, 1999, defendants W.R. GRACE and STRINGER told the EPA On-Scene Coordinator that Libby Mine vermiculite concentrate at the Export Plant and at the Screening Plant contained less than one percent tremolite asbestos, thereby concealing the true hazardous nature of the asbestos contamination, delaying EPA's investigation and causing releases of asbestos into the air in the Libby community.

> From on or about November 23, 1999 through approximately spring of 2000, defendants W.R. GRACE and STRINGER led EPA employees and contractors associated with EPA's Superfund cleanup, to various locations that were contaminated with tremolite asbestos, including: the "Mine Site," "Rainy Creek Road," the "Screening Plant," the "Flyway" and the "Export Plant," without disclosing the extent and nature of the contamination at these locations.

Paragraph 175 of the Superseding Indictment reads:

> From on or about November 23, 1999 through approximately spring of 2000, defendants W.R. GRACE and STRINGER led EPA employees and contractors associated with EPA's Superfund cleanup, to various locations that were contaminated with tremolite asbestos, including: the "Mine Site," "Rainy Creek Road," the "Screening Plant," the "Flyway" and the "Export Plant," thereby disturbing and causing to be disturbed asbestos-contaminated vermiculite, releasing asbestos into the air, all without disclosing the extent and hazardous nature of the asbestos contamination at these locations.

III. Analysis

A. Validity of the Superseding Indictment

The first issue here is the Defendants' contention that the Superseding Indictment contains the same defect that resulted in the dismissal of the knowing endangerment object alleged in the original, i.e. that

there is no allegation of an overt act in furtherance of the knowing endangerment object within the limitations period. The Defendants argue that because the Superseding Indictment alleges no new acts, it cannot cure the defect of failing to allege an overt act within the statute of limitations, a failure fatal to that limited allegation of the Count I conspiracy. This argument misapprehends the nature of the defect in the original Indictment.

The analysis in the June 8, 2006 Order focused on the nature of the overt acts *as alleged,* and concluded that the Indictment did not allege any overt acts in furtherance of the knowing endangerment object as required. The Order did not conclude that as a matter of fact the acts described in Paragraphs 173-183 could not possibly have been acts done in furtherance of the knowing endangerment object. Such a conclusion would impermissibly encroach on the role of the jury as the trier of fact. Rather, I found that the original Indictment failed to cast the acts described in Paragraphs 173-183 as acts in furtherance of the knowing endangerment object. That conclusion was based on the factual allegations and the context in which those allegations were presented in the Indictment. For example, in discussing Paragraph 175, the June 8 Order reads:

> It is therefore possible to conclude that by bringing unknowing individuals onto the properties in question, the Defendants are alleged to have knowingly brought about a scenario whereby endangerment could occur under the government's theory. Nonetheless, under an objective reading of Paragraph 175, and taking into account the other paragraphs

> included under the "Obstruction of EPA's Superfund Clean-Up" subheading, it is more plausible that the acts alleged were done in furtherance of the defrauding object.

Grace, 434 F. Supp. 2d at 888.

The Superseding Indictment, while alleging the same facts, places them in a different context, making clear the government's theory that the acts in Paragraphs 173-183 were done in part in furtherance of the knowing endangerment object. The question to be asked in resolving the Defendants' argument is this: Would the Court have dismissed the knowing endangerment object if the original Indictment had contained the allegations presented in the Superseding Indictment? The Superseding Indictment, as the overt acts are now alleged, would have survived the Defendants' first motion to dismiss the knowing endangerment object of the Count I conspiracy.[6] Because the Superseding

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[6] It is not necessary, as the Defendants suggest, for the government to allege acts done "for the purpose of endangering others." Defs.' Reply Br. at p. 7-8 n. 4. The Court's June 8, 2006 Order states, "It is true that one effect of the obstruction was to prolong the alleged ongoing risk of exposure to tremolite, but the mere fact that an act will result in continued danger does not mean the act was done with the purpose of prolonging the danger." *Grace*, 434 F. Supp. 2d at 888. The Court's reference to the "purpose of prolonging the danger" is not a legal determination about the requisite mental state that must be alleged. The Clean Air Act's knowing endangerment provision requires that the defendant acted knowingly. The Defendants point out that an overt act is an act done "for the purpose of carrying out the conspiracy," citing Ninth Circuit Model Criminal Instruction 8.16 (2003). Relying on this, the Defendants attempt to bootstrap the requisite mental state for knowing endangerment from knowingly to intentionally, i.e.

Indictment is not defective on its face, the Defendants must show either that (1) the use of the language "with prejudice" bars re-prosecution or (2) the Superseding Indictment cannot relate back to the filing date of the original and is therefore time-barred under the five-year statute of limitations.

B. Dismissal "With Prejudice"

The Defendants argue that the knowing endangerment object of the Superseding Indictment conspiracy must be dismissed because re-prosecution is barred by the Court's dismissal of the original claim "with prejudice." In support, they cite *United States v. Transfiguracion*, 442 F.3d 1222 (9th Cir. 2006). In *Transfiguracion,* the district court dismissed an indictment against the defendants based on the court's conclusion that the terms of the defendants' plea agreements prohibited the government from prosecuting them for the offenses covered by the indictment. In describing the effect of the district court's dismissal, the court of appeals wrote:

> As a means of effectuating the promise that the conspiracy prosecutions could not go forward, the district court concluded that dismissal of the indictment against Transfiguracion and Dao was the proper remedy. Although this

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that the Defendants acted "for the purpose of endangering others." With regard to Count I, the interplay between the conspiracy charge and the knowing endangerment object requires that the government prove an overt act done for the purpose of releasing a hazardous pollutant with the knowledge that the release placed another person in danger of death or serious bodily injury.

> dismissal was not specified as "with prejudice," it is evident that the district court was contemplating a dismissal on the merits, which "precludes a trial on a reindictment of the same charge."

442 F.3d at 1236 (quoting *United States v. Cejas*, 817 F.2d 595, 600 (9th Cir. 1987)).

The Defendants' reading of the language in *Transfiguracion* is too broad. *Transfiguracion* stands for the proposition that a court does not need to use the language "with prejudice" in order to effect a dismissal on the merits. It does not say that every use of the words "with prejudice" results in a dismissal on the merits. Other cases from the Ninth Circuit show that a court's use of the language "with prejudice" does not preclude re-prosecution every time the phrase is used. In *United States v. Castiglione*, 876 F.2d 73 (9th Cir. 1989), the government moved to dismiss the indictment without prejudice and informed the court that it intended to seek a superseding indictment alleging some of the same offenses as the original. *Id.* at 74. The trial court told the government that no counts of the original indictment would be dismissed without prejudice and that the case would proceed to trial on the original indictment unless a superseding indictment was filed prior to the trial date. *Id.* at 74-75. The government obtained a superseding indictment and again sought dismissal of the original without prejudice, which was denied. *Id.* The government then moved to dismiss the original with prejudice and the motion was granted. After this turn of events, the defendant moved to dismiss those charges of the superseding indictment that were alleged in the original indictment, on the

ground that the dismissal of the original "with prejudice" barred re-prosecution. *Id.* at 75.

In holding that the dismissal with prejudice did not bar subsequent prosecution on the dismissed charges, the *Castiglione* court wrote:

> Although the trial judge used the words "with prejudice," he did not intend the dismissal to bar prosecution on any charges contained in the pending superseding indictment. A judge's ruling does not bar further prosecution if it does not represent a resolution in favor of the defendant on some or all of the factual elements of the offense charged.

Id. at 76. *See also, United States v. Apex Distributing Co.,* 270 F.2d 747 (9th Cir. 1959), in which the court stated:

> Had the statute of limitations not barred new indictments, the Government could have reindicted appellees despite the words 'with prejudice' added to these dismissal orders. If dismissal of the new indictments were then sought because of the 'with prejudice' provision, it may be assumed that the court would deny the motions. This it could do by modifying the original orders so as to delete the words 'with prejudice,' or by holding that these words were surplusage.

Id. at 750-751 (footnote omitted).

These Ninth Circuit cases show that dismissal of a criminal charge only bars re-prosecution if it represents a resolution in the defendant's favor on some or all of the factual elements of the offense charged. Where the dismissing court did not intend

for its decision to resolve the allegation on the merits, further prosecution is not barred simply because of the language used in the dismissal.

In this case the Court's dismissal was based on a pleading defect, i.e., a failure to allege an overt act in furtherance of the knowing endangerment object of the conspiracy within the limitations period; there was no consideration or resolution of the factual elements of the offense charged. Accordingly, the Court's use of the words "with prejudice" does not by itself prevent re-prosecution. Moreover, the Court has the power to modify its original order to remove the words "with prejudice" from the dismissal language. *See Apex*, 270 F.2d at 750-751. There is no need for such an amendment in this case, however, because the prosecution of the knowing endangerment object is time-barred by the statute of limitations.

C. Statute of Limitations

The most recent of the overt acts alleged in the Superseding Indictment's amended paragraphs are those described in Paragraph 175. There, it is alleged that Defendants Grace and Stringer led EPA officials and others onto contaminated properties "[f]rom on or about November 23, 1999 through approximately spring of 2000." The statute of limitations ran as to those overt acts in the spring of 2005, more than a year before the knowing endangerment object of the original Indictment was dismissed and the Superseding Indictment was filed.[7] When an indictment is dismissed after the

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[7] Because the conspiracy statute under which the Defendants are charged does not contain its own statute of limitations, the

limitations period has run, whether re-indictment is time-barred is governed by 18 U.S.C. § 3288, which provides:

> Whenever an indictment or information charging a felony is dismissed for any reason after the period prescribed by the applicable statute of limitations has expired, a new indictment may be returned in the appropriate jurisdiction within six calendar months of the date of the dismissal of the indictment or information, or, in the event of an appeal, within 60 days of the date the dismissal of the indictment or information becomes final, or, if no regular grand jury is in session in the appropriate jurisdiction when the indictment or information is dismissed, within six calendar months of the date when the next regular grand jury is convened, which new indictment shall not be barred by any statute of limitations. **This section does not permit the filing of a new indictment or information where the reason for the dismissal was the failure to file the indictment or information within the period prescribed by the applicable statute of limitations, or some other reason that would bar a new prosecution.**

(Emphasis added.)

Although the plain language of § 3288 would seem to preclude re-prosecution in this case, the

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offense is subject to the five-year statute of limitations generally applicable to non-capital federal criminal offenses. *See* 18 U.S.C. § 3282(a).

Ninth Circuit's interpretation of the statute in *United States v. Clawson*, 104 F.3d 250 (9th Cir. 1996) complicates the question. The defendant in *Clawson* was charged with conspiracy and mail fraud for selling nonexistent insurance. The indictment charged the defendant with overt acts prior to June 10, 1988, and alleged more overt acts after he had actually withdrawn from the conspiracy on July 5, 1988. *Id.* at 251. There were no overt acts alleged in the window between June 10 and July 5 of 1988, a critical fact because the pre-June 10 acts were outside the limitations period and the post-July 5 acts could not be attributed to the defendant because of his withdrawal. *Id.* For that reason the district court dismissed the statute of limitations for failure to allege an overt act as to the defendant within the limitations period. *Id.*

The government then obtained a superseding indictment in which it alleged overt acts within the June 10-July 5 window. *Id.* The new allegations would have fallen within the limitations period if they had been alleged in the original indictment, but instead they were contained in a superseding indictment that was filed after the statute had run as to all of the defendant's involvement in the conspiracy. *Id.* The defendant moved to dismiss the indictment, arguing that § 3288's savings provision does not extend the limitations period for indictments dismissed for failure to comply with the statute of limitations. The district court denied the motion and the defendant was convicted. *Id.*

On appeal, the Ninth Circuit discussed the purpose of § 3288, stating, "'[The] underlying concept of § 3288 is that if the defendant was indicted within time, then *approximately* the *same facts* may be

used for the basis of any new indictment [obtained after the statute has run], if the earlier indictment runs into legal pitfalls.'" *Id.* (quoting *United States v. Charnay,* 537 F.2d 341, 354 (9th Cir. 1976)). The court acknowledged the apparent applicability of the final sentence of § 3288, stating:

> This new last sentence seems to exclude Clawson's reindictment from section 3288's savings provision because the district court here dismissed the conspiracy count of the original indictment for failing to allege that one of the elements of the crime (an overt act) took place within the statute of limitations. Clawson urges us to read the last sentence of section 3288 as barring the use of the section's savings provision whenever an indictment is dismissed because of failure to comply with the statute of limitations. But the sentence says more: It denies the government the six-month extension if an indictment is dismissed for failure to meet the statute of limitations "or some *other* reason that would bar a new prosecution." Read in its entirety, this last sentence cuts off the six-month grace period only where the defect-whether it's a limitations problem "or some other" problem-is not capable of being cured.

104 F.3d at 252.

Based on this interpretation of § 3288, the court held that the government was entitled to a six-month grace period to reindict because the defect in the original indictment could be cured. *Id.* The court noted that the original indictment was brought within the limitations period and was dismissed on a technicality, and held that the application § 3288's

six-month grace period was appropriate because the statute "merely allows the government to do what it had a right to do in the first place." *Id.* As the court put it, "Clawson was charged within the statutory period with the exact crime for which he could have been prosecuted had there not been a defect in the indictment." *Id.* The court distinguished a scenario in which "the original indictment was brought after the limitations period ran on all the alleged criminal conduct," in which case the court held re-indictment would not be possible. *Id.*

The government's reliance on *Clawson* here cannot overcome this critical distinction: The Defendants in this case, unlike the defendant in *Clawson,* were not charged within the statutory period as the law requires when an overt act is charged as part of a conspiracy. The prosecution in *Clawson* alleged overt acts within the limitations period *in the original indictment.* The conspiracy allegation in *Clawson,* while flawed in other respects, was timely. In this case, the original Indictment failed to allege an overt act in furtherance of the knowing endangerment object within the limitations period. To allow the government a six-month grace period in this case would extend the statute of limitations for the improper purpose of affording the prosecution a second opportunity to do what it failed to timely do in the beginning. The extent of *Clawson*'s holding is debatable, but it is clear that *Clawson* does not require a defendant to remain subject to an indefinite threat of prosecution, held open beyond the limitations period, while he and the court wait for the government to finish tinkering with the indictment.

My exchange with the government's counsel at oral argument on this motion leaves the impression that the prosecution continues to insist on its theory that each of the overt acts listed in the Indictment is charged as an act in furtherance of both objects of the Count I conspiracy. This is so, the government argues, because the true overarching purpose of the charged conspiracy was to make money and save money. Since both the defrauding object and the knowing endangerment object serve the ultimate purpose of increasing the company's wealth, the argument goes, all overt acts are attributable to both objects. The problem with this argument is that the Defendants are not charged with a conspiracy to make money. They are charged with a conspiracy having two unlawful objects. The law requires that as to each object the government allege an act in furtherance within the statute of limitations. *See United States v. Yates*, 354 U.S. 298 (1957), *overruled on other grounds*, *Burks v. United States*, 437 U.S. 1, 2 (1978). This the government has failed to do with regard to the knowing endangerment object of the conspiracy charged In Count I.

Government counsel characterized the prosecution's case as a quest for justice. Justice is the primary concern of this Court as well. But there is a difference: While the prosecution views its quest for justice as the pursuit of a particular outcome, this Court is bound to uphold that conception of justice, rooted in our Constitution and laws, that lies in the process. The knowing endangerment object of the Count I conspiracy is time- barred. Section 3288 cannot save it. Some may say this determination is based on a mere technicality but that would miss the point. "'In a society devoted to the rule of law, the difference between violating or not violating a

criminal statute cannot be shrugged aside as a minor detail.' " *Goldyn v. Hayes* 444 F.3d 1062, 1070 (9th Cir. 2006) (Kosinski, J.) (quoting *Dretke v. Haley*, 541 U.S. 386, 399-400 (2004)) (Kennedy, J., dissenting). The Defendants' motion is granted.

IV. Order

Therefore, IT IS HEREBY ORDERED that the Defendants' motion to dismiss the knowing endangerment object of Count I of the Superseding Indictment (Doc. No. 596) is GRANTED, and the knowing endangerment object is DISMISSED.

DATED: this 27th day of July, 2006.

/s/
DONALD W. MOLLOY, Chief Judge
United States District Court

APPENDIX E

DISTRICT COURT OPINION - ORDER ON MOTION TO DISMISS COUNT 1 OF THE INDICTMENT

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2006 Jun 6 PM 1:36
PATRICK E. DUFFY
By: _____
Deputy Clerk

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MONTANA MISSOULA DIVISION

UNITED STATES OF AMERICA, *Plaintiff,* vs.	)	CR 05-07-M-DWM
W.R. GRACE, ALAN R. STRINGER, HENRY A. ESCHENBACH, JACK W. WOLTER, WILLIAM J. MCCAIG; ROBERT J. BETTACCHI; O. MARIO FAVORITO, ROBERT C. WALSH, *Defendants.*	)	ORDER

I. Introduction[1]

Defendant Harry Eschenbach has filed a motion on behalf of all Defendants to dismiss or limit Count

[1] The facts of this case are well known to the Court and the parties and will not be recited here except where necessary.

I of the Indictment because the knowing endangerment object is barred by the statute of limitations. The Defendants argue that the Indictment does not allege any overt acts done in furtherance of the knowing endangerment object within the five-year statute of limitations. The United States opposes the motion as untimely and argues on the merits that the post-1999 acts of concealment alleged in the Indictment are acts done in furtherance of both the defrauding object and the knowing endangerment object of the conspiracy. In this case the Defendants have the better argument. As a consequence, the knowing endangerment allegation of the conspiracy count will be dismissed for the reasons set forth below.

II. Background

Count I of the Indictment charges:

> 71. That beginning on or about 1976, and continuing until on or about 2002, at Libby, and other locations within and without the District of Montana, the defendants, W.R. GRACE, ALAN R. STRINGER, HENRY A. ESCHENBACH, JACK W. WOLTER, WILLIAM J. McCAIG, ROBERT J. BETTACCHI, O. MARIO FAVORITO, and ROBERT C. WALSH, and others known and unknown to the grand jury did knowingly combine, conspire and agree among themselves and others:
>
> **OBJECTS OF THE CONSPIRACY**
>
> a. To knowingly release and cause to be released into the ambient air a hazardous air pollutant, namely asbestos, and at the time knowingly placed persons, including:

families of employees of W.R. GRACE Libby vermiculite mining and processing operations; residents of Libby, Montana and surrounding communities in Lincoln County; and others in imminent danger of death or serious bodily injury in violation of 42 U.S.C. § 7413(c)(5)(A).

b. To defraud the United States and others by impairing, impeding, and frustrating the governmental functions of the United States, including the United States Environmental Protection Agency (EPA) and the Department of Health and Human Services, specifically, the National Institute for Occupational Safety and Health ("NIOSH"); being federal agencies responsible for administering federal laws and regulations designed to protect public health and safety and the environment in violation of 18 U.S.C. § 371.

72. It was a purpose of the conspiracy to conceal and misrepresent the hazardous nature of the tremolite asbestos contaminated vermiculite, thereby enriching defendants and others.

73. It was a purpose of the conspiracy to increase profits and avoid liability by misleading the government and preventing the government from using its authorities to protect against risks to human health and the environment associated with the manufacture, processing, distribution, commerce, use, handling, disposal, and

release of tremolite asbestos contaminated vermiculite.

MANNER AND MEANS OF THE CONSPIRACY

The following manner and means, among others, were used by the defendants to effectuate and perpetuate the conspiracy set forth above:

74. It was part of the conspiracy that the defendants obtained knowledge of the hazardous nature of the tremolite asbestos contaminated vermiculite through various means, including, but not limited to: scientific testing and analysis, including animal studies; epidemiological studies of employees; employee medical screening and examinations; employee medical record reviews; collection and evaluation of a deceased employee's lung tissue; review of employee death certificates; conducting employee morbidity and mortality studies; employee autopsy reviews; review of medical and scientific literature; reviewing reports from insurance carriers; and reviewing employee worker's compensation claims.

75. It was part of the conspiracy that the defendants obtained knowledge of the propensity of tremolite asbestos contaminated vermiculite, when disturbed, to release fibers into the ambient air (also known as "friability") through various means, including, but not limited to: product testing, including attic simulation and vermiculite materials handling tests ("drop tests"); and air and bulk sampling at the

Libby Mine and other defendant W.R. GRACE facilities in and around Libby, Montana, at defendant W.R. GRACE owned and licensed expansion plants, at the facilities of customers using vermiculite materials, and at the Libby High School track.

76. It was part of the conspiracy that the defendants concealed the full extent of their knowledge of the hazardous nature and friability of the tremolite asbestos contaminated vermiculite from employees of defendant W.R. GRACE Libby vermiculite mining and processing operations; families of employees of defendant W.R. GRACE Libby vermiculite mining and processing operations; industrial customers of defendant W.R. GRACE Libby vermiculite products; employees of industrial customers of defendant W.R. GRACE Libby vermiculite products; residents of Libby, Montana and surrounding communities in Lincoln County, Montana; and government authorities.

77. It was part of the conspiracy that the defendants obstructed, impeded, and frustrated the governmental authorities by withholding information regarding the hazardous nature and friability of the tremolite asbestos contaminated vermiculite and asserting that the Libby Mine operations and Libby vermiculite posed no risk to public health and safety and the environment.

* * *

79. It was part of the conspiracy that the defendants sold and leased tremolite

asbestos contaminated real property and withheld information about the contamination from the purchasers of the property.

80. It was part of the conspiracy that defendants provided and distributed tremolite asbestos contaminated vermiculite material to the community, resulting in releases of asbestos into the ambient air in and around Libby, Montana and surrounding communities in Lincoln County, Montana.

* * *

82. It was part of the conspiracy that the defendants falsely described, concealed from, and failed to reveal to the government the hazardous nature and friability of the tremolite asbestos in the Libby vermiculite and the health hazards associated with exposure to tremolite asbestos.

83. It was part of the conspiracy that the defendants obstructed, impaired, impeded, and misled EPA during the course of EPA's emergency response to the asbestos contamination in and around Libby, Montana.

III. Analysis

A. Timeliness

Rule 12(c), Fed. R. Crim. P. states, "The court may, at the arraignment or as soon afterward as practicable, set a deadline for the parties to make pretrial motions and may also schedule a motion hearing." Rule 12(e) states, "A party waives any Rule

12(b)(3)[2] defense, objection, or request not raised by the deadline the court sets under Rule 12(c) or by any extension the court provides. For good cause, the court may grant relief from the waiver."

The Scheduling Order in this case set December 15, 2005 as the deadline for motions challenging the facial insufficiency of the charges. The Defendants filed several motions to dismiss in compliance with that deadline, including motions predicated on the statute of limitations. This motion was filed over three months late, on March 20, 2006. Not only does the filing fail to comply with the December 15, 2005 deadline for motions based on statutes of limitation, but it comes nearly three weeks after the March 1, 2006 deadline for all pretrial motions other than motions in limine. The Defendants explain the delay by stating that the Court's March 3, 2006 Order on the Defendants' motions to dismiss "exposed a critical defect in the Indictment." Defs' Br. at 2. The defect that the Defendants say this Court "exposed" is that "the government has not alleged a single overt act in furtherance of the endangerment prong of the alleged conspiracy within the limitations period." *Id.*

The government counters by observing that the instant motion relies on a theory that is an extension of earlier arguments raised by the Defendants in

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[2] Rule 12(b)(3), Fed. R. Crim. P. requires that motions alleging a defect in the indictment, other than motions claiming lack of jurisdiction, must be raised before trial. A statute of limitations defense is not jurisdictional, *United States v. Akmakjian*, 647 F.2d 12, 14 (9th Cir. 1981), and is therefore within the scope of Rule 12(b)(3).

their motions to dismiss. The government's argument is persuasive. In the March 3, 2006 Order, the Court agreed with the Defendants that knowing endangerment under the Clean Air Act is not a continuing offense. This is an argument that the Defendants made in their motion to dismiss filed December 15, 2005 (Doc. No. 251). The alleged defect cited by the Defendants is the Indictment's failure to allege within the limitation period an overt act in furtherance of the knowing endangerment object; if the Defendants are correct that this is a flaw in the Indictment, it is one that existed on the day this case was filed. The Court's March 3, 2006 Order did not create a legal predicate for the motion where none existed before.

At the hearing on the motion counsel for the Defendants suggested that it would have been inappropriate to bring this motion to dismiss before the Court had decided their motion to dismiss the Clean Air Act counts. I do not share the Defendants' view; there would have been nothing at all improper in bringing this motion along with the Defendants' other motions to dismiss. Moreover, given the Defendants' willingness throughout this case to promptly bring legal issues to the Court's attention, or as the Defendants have put it, to "race into court,"[3] I am not convinced that considerations of propriety were behind their failure to comply with

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[3] *See* Defendants' Joint Reply in Support of Their Motion For Limited Stay Pending Appeal, or, in the Alternative, For Implementation of the Court's December 5 Order Precluding the Government's Expert Witnesses From Relying on Previously Undisclosed Data (Doc. No. 389) at p. 5.

the Scheduling Order. The Defendants' untimely filing is due to their failure to identify and raise the issue earlier.

By failing to bring their motion in accordance with the Scheduling Order, the Defendants have waived their statute of limitations argument under the Federal Rules of Criminal Procedure. The Defendants neglected to seek an extension of the deadline or request leave to file an untimely motion. The question remains whether good cause exists for granting relief from the waiver. I find that it does. This case could reasonably have been tried on a much more abbreviated schedule than the one established in the March 15, 2005 Scheduling Order. The longer schedule was designed to allow for the inevitable delays that accompany a case of this size while preserving a trial date upon which the parties and the Court could rely in their planning. The Court's decision to figure delays into the pretrial scheduling process has proven to be a sound one, as the government has throughout much of the case been a step slow in complying with its discovery obligations. Given that the deadlines set forth in the Scheduling Order have been as often honored in the breach as in the observance, and that in each case thus far it has been the government who has failed to comply and the Defendants who have been inconvenienced, fairness dictates that the Defendants be allowed this dilatory filing. The Defendants are accordingly relieved from the waiver,

and the Court will consider the motion on its merits.[4]

B. Statute of Limitations

The Defendants move to dismiss the knowing endangerment object of the Count I conspiracy as time-barred under the five-year statute of limitations.[5] They rely primarily on *Yates v. U.S.*, 354 U.S. 298 (1957), *overruled on other grounds, Burks v. United States*, 437 U.S. 1, 2 (1978), in which the Supreme Court held that where the government has charged a conspiracy with more than one object, the statute of limitations must be satisfied independently as to each. In *Yates*, the defendants were convicted a single conspiracy consisting of two objects: one to organize a society intended to encourage the violent overthrow of the federal government, and another to advocate the violent overthrow of the federal government. 354 U.S. at 300.[6] The Supreme Court reversed the conviction due to its conclusion that the object of organizing a seditious society, in this case the

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[4] This is not to suggest that compliance with the Scheduling Order is optional. To date, the failures to timely comply with the trial schedule have not jeopardized the trial date. Given the proximity to the start of trial, any future failures to adhere to deadlines will be problematic for the offending party.

[5] Because the conspiracy statute does not contain its own statute of limitations, the offense carries the five-year statute of limitations generally applicable to non-capital federal criminal offenses. *See* 18 U.S.C. § 3282(a).

[6] Organizing and advocating were separate offenses under the Smith Act. 354 U.S. at 302 n. 1.

Communist Party, had been completed outside the limitations period. Ongoing party activities that continued into the limitations period, such as recruiting new members and forming new units, were held not to have been undertaken in furtherance of the organizational object, but rather solely for the purpose of advancing the advocacy objective. The Court reversed the jury's general verdict of guilt on the conspiracy count because it was unclear whether the overt act upon which the jury agreed related to the advocacy object or the time-barred organizational object. *Id.* at 311-312.

The Defendants here contend that the knowing endangerment object is time-barred because the Indictment does not allege an act in furtherance of that object within the limitations period, which this Court has previously determined stretches back to November 3, 1999. *See United States v. Grace*, 429 F. Supp. 2d 1207, 2006 WL 1211162, *36 n.30 (D. Mont. 2006). The government disagrees, arguing that Yates is distinguishable from this case and that every overt act alleged in the Indictment is alleged to have been done in furtherance of both objects of the Count I conspiracy.

There is no basis for holding the rule of *Yates* inapplicable here. The prosecution attempts to do so by relying on this Court's ruling on the Defendants' motion to dismiss Counts II through IV (the substantive knowing endangerment counts) as time-barred, in which the Court dismissed the charges in those counts pertaining to criminal acts completed before November 3, 1999, but ordered that "the case will proceed to trial on what remains of Counts II through IV." *Grace*, 2006 WL 1211162, *34. The government argues that the Court's refusal to

dismiss the knowing endangerment counts entirely must mean that certain knowing endangerment offenses were not complete until after November 3, 1999. Because the Indictment alleges releases within the limitation period, the prosecution argues, there is no statute of limitation problem.

The flaw in the government's argument is that it overlooks the apparent nature of the government's theory on the substantive knowing endangerment counts. The Indictment does not allege any specific "release" of hazardous air pollutants after November 3, 1999. Instead, as the Defendants have stated, the government's theory appears to be that "some of the defendants 'caused' releases within the limitations period by placing contaminated vermiculite in locations where innocent third parties would later unknowingly release tremolite fibers into the ambient air." Defs' Br. at 8. But while that theory may be viable and may therefore bring certain completed substantive knowing endangerment offenses within the limitations period, it does not transfer to the conspiracy charge. Conspiracy requires an overt act within the limitations period, which is not the same as a completed substantive offense within the limitations period. An overt act is any act done by a conspirator to effect the object of the conspiracy. 18 U.S.C. § 371. Under the government's theory, a knowing endangerment offense could have been completed within the limitations period in the absence of any contemporaneous overt act by a conspirator. Accordingly, the Court's finding that under the government's theory the Indictment alleges completed substantive knowing endangerment offenses occurring within the limitations period does not mean that it also alleges an overt act in

furtherance of the conspiracy to commit knowing endangerment within the limitations period.

Because *Yates* controls, the allegations in the Indictment conspiracy count should be dismissed unless it alleges an overt act in furtherance of the knowing endangerment object within the limitations period. The government says the requisite allegations can be found in the following paragraphs of the Indictment:[7]

> 143. From on or about 1981 and continuing through 2000, defendant W.R. GRACE failed to completely remove vermiculite materials contaminated with tremolite asbestos from the Plummer Elementary School ice skating rink.
>
> 149. From on or about 1981 and continuing through 2000, defendants W.R. GRACE, McCAIG, WOLTER, and STRINGER failed to completely remove vermiculite materials contaminated with tremolite asbestos from the Libby Junior and Senior High School tracks.

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[7] The paragraphs of the Indictment listed in this Order are those that are identified specifically by the government in its response. The government continues to argue that each overt act alleged in the Indictment is alleged to have been done in furtherance of both objects of the conspiracy. As they say, "that dog don't hunt." The argument does not work for several reasons, the most obvious of which is that the criminal Clean Air Act provision upon which the knowing endangerment charge is based was not enacted until 1990, long after dozens of the alleged overt acts in furtherance of the conspiracy had already occurred. *See* Clean Air Act Amendments of 1990, Pub. L. 101-549, 104 Stat. 2672.

173. On or about November 23, 1999, defendants W.R. GRACE and STRINGER told the EPA On-Scene Coordinator that Libby Mine vermiculite concentrate at the Export Plant and at the Screening Plant contained less than one percent tremolite asbestos.

174. On or about November 23, 1999, defendants W.R. GRACE and STRINGER told the EPA On-Scene Coordinator that historical asbestos contamination problems at the Libby Mine had been resolved and provided one page of air monitoring data gathered during closure of the mine site to demonstrate that current conditions were safe.

175. From on or about November 23, 1999 through approximately spring of 2000, defendants W.R. GRACE and STRINGER led EPA employees and contractors associated with EPA's Superfund cleanup, to various locations that were contaminated with tremolite asbestos, including: the "Mine Site," "Rainy Creek Road," the "Screening Plant," the "Flyway" and the "Export Plant," without disclosing the extent and nature of the contamination at these locations.

176. On or about February 22, 2000, defendants W.R. GRACE and STRINGER responded to an EPA CERCLA104(e) Request For Information regarding the "Libby Asbestos Site" and provided the following false and misleading information: that defendant W.R. GRACE did not provide

vermiculite contaminated with tremolite asbestos to the general public in Libby.

177. On or about February 22, 2000, defendants W.R. GRACE and STRINGER responded to an EPA CERCLA 104(e) Request For Information regarding the "Libby Asbestos Site" and failed to inform EPA that defendant W.R. GRACE had donated vermiculite mill coarse tailings contaminated with tremolite asbestos to Libby public schools for surfacing the Junior High School running track.

178. On or about February 22, 2000, defendants W.R. GRACE and STRINGER responded to an EPA CERCLA 104(e) Request For Information regarding the "Libby Asbestos Site" and failed to inform EPA that defendant W.R. GRACE had donated vermiculite mill coarse tailings contaminated with tremolite asbestos to the Libby Public School District for the foundation of the Plummer Elementary School outdoor ice skating rink.

179. On or about February 22, 2000, defendants W.R. GRACE and STRINGER responded to an EPA CERCLA 104(e) Request For Information regarding the "Libby Asbestos Site" and failed to disclose that defendant W.R. GRACE used waste materials contaminated with tremolite asbestos to "sand" Rainy Creek Road.

180. On or about February 22, 2000, defendants W.R. GRACE and STRINGER responded to an EPA CERCLA 104(e) Request For Information regarding the

"Libby Asbestos Site" and failed to disclose all locations where asbestos contaminated vermiculite materials were located, including: the "Flyway" and the "Bluffs."

181. On or about February 22, 2000, defendants W.R. GRACE and STRINGER responded to an EPA CERCLA 104(e) Request For Information regarding the "Libby Asbestos Site" and provided the following false and misleading information: that defendant W.R. GRACE employees did not regularly leave the facility with dust contaminated with tremolite asbestos on their clothing.

182. On or about February 22, 2000, defendants W.R. GRACE and STRINGER responded to an EPA CERCLA 104(e) Request For Information regarding the "Libby Asbestos Site" and failed to disclose all air and environmental media sampling information.

183. On or about February 22, 2000, defendants W.R. GRACE and STRINGER responded to an EPA CERCLA 104(e) Request For Information regarding the "Libby Asbestos Site" and failed to disclose the existence and dispositions of the following waste streams, among others: "Stoner Rock" and waste vermiculite concentrate.

184. On or about April 10, 2002, in response to a proposal by EPA to declare a "public health emergency" for the City of Libby that would allow EPA to remove asbestos containing attic insulation from homes in

> Libby, defendant W.R. GRACE, in a letter to the Administrator of EPA, stated the following:
>
> (i) "Grace's expanded vermiculite, which was used in ZAI, poses no risk to human health or the environment;"
>
> (ii) "... [ZAI] contains biologically insignificant amounts of respirable asbestos fibers;"
>
> (iii) "... it is reasonable to expect that disturbance of [ZAI] will not result in hazardous levels of airborne asbestos fibers;" and
>
> (iv) "... there is no credible reason to believe that ZAI has ever caused an asbestos-related disease in anyone who has used in his/her home."

Paragraphs 143 and 149 do not bring the knowing endangerment object within the statute of limitations because they do not allege overt acts. The failure of the Defendants over twenty years to take steps to fully remediate the grounds of Libby public schools is not an overt act done to effect an object of the conspiracy as required by 18 U.S.C. § 371. "Though the result of a conspiracy may be continuing, the conspiracy does not thereby become a continuing one...." *United States v. Walker*, 653 F.2d 1343, 1347 (9th Cir. 1981) (quoting *Fiswick v. United States*, 329 U.S. 211, 216 (1946)). The purpose of the overt act requirement is "to manifest that the conspiracy is at work, and is neither a project still resting solely in the minds of the conspirators nor a fully completed operation no longer in existence." *Yates*, 354 U.S. at 334. The

failure to fully abate the schoolyard contamination more plausibly suggests a completed operation than a conspiracy still at work.

Paragraphs 173, 174, and 176-184 allege a series of false and misleading statements made during the course of the EPA's investigation and clean-up in Libby. These paragraphs unquestionably allege concealment of the extent of the contamination in Libby in furtherance of the defrauding object of the Count I conspiracy. The question is whether that concealment is also alleged to have been undertaken in part for purposes of advancing the knowing endangerment object. The government argues in the affirmative, stating, "[I]t can be fairly read that all of these overt acts served the same purpose: to limit the defendants' liability through obstruction of EPA's functions and causing/concealing the ongoing endangerment posed to the townspeople of Libby and Lincoln County." Govt.'s Br. at 7.

The Defendants correctly point out that the inclusion of the word "causing" in the quoted sentence makes little sense. The government concedes that the overt acts serve the purpose of limiting the Defendants' liability, but attempts to save the point by inserting a reference to causing ongoing endangerment. But it is not clear how causing further endangerment limits the Defendants' liability. The paragraphs at issue fall under a subheading of the Indictment's "OVERT ACTS" section titled "Obstruction of EPA's Superfund Clean-Up," and obstruction is precisely what the paragraphs allege. It is true that one effect of the obstruction was to prolong the alleged ongoing risk of exposure to tremolite, but the mere fact that an act will result in continued danger does not mean

the act was done with the purpose of prolonging the danger.

An overt act is an act done "for the purpose of carrying out the conspiracy." Ninth Circuit Model Criminal Instruction 8.16 (2003). Taken in the context of the Indictment as a whole, the acts alleged in Paragraphs 173, 174, and 176-184 were done for the purpose of concealing the Defendants' wrongdoing and limiting their liability (the defrauding object), and had the ancillary effect of continuing the danger posed by the contamination in Libby (the knowing endangerment object). Accordingly, the paragraphs in question cannot be construed as alleging acts in furtherance of the knowing endangerment object.

The lone remaining allegation, contained in Paragraph 175, poses a more difficult question. That paragraph alleges that Defendants Grace and Stringer led EPA officials and others to contaminated cites in and around Libby without disclosing the nature of the contamination. The Defendants are alleged to have been aware of the toxicity and friability of tremolite, and are alleged to have known of its presence at each of the sites visited in Paragraph 175. It is therefore possible to conclude that by bringing unknowing individuals onto the properties in question, the Defendants are alleged to have knowingly brought about a scenario whereby endangerment could occur under the government's theory. Nonetheless, under an objective reading of Paragraph 175, and taking into account the other paragraphs included under the "Obstruction of EPA's Superfund Clean-Up" subheading, it is more plausible that the acts alleged were done in furtherance of the defrauding object.

The crux of the allegation in Paragraph 175 is the failure to be fully truthful with the authorities. A fair reading of the Indictment compels the conclusion that the point of the alleged wrongful conduct in that paragraph was not to endanger EPA officials, but rather to mislead them. Although the acts alleged in Paragraph 175 may have resulted in prolonged endangerment, I cannot conclude that the paragraph alleges acts done in furtherance of the knowing endangerment object when the language and context of the paragraph so clearly suggest another purpose.

Because the government has failed to allege an overt act in furtherance of the knowing endangerment object within the limitations period, *Yates* requires that the knowing endangerment object of the Count I conspiracy be dismissed as time-barred.

IV. Order

Based on the foregoing, IT IS HEREBY ORDERED that the Defendants' motion to dismiss or limit Count I (Doc. No. 351) is GRANTED and the knowing endangerment object of Count I (Indictment ¶ 71(a)) is DISMISSED WITH PREJUDICE as time-barred under the statute of limitations.

DATED: this 8th day of June, 2006.

/s/
DONALD W. MOLLOY, Chief Judge
United States District Court

APPENDIX F

SUPERSEDING INDICTMENT

Filed
Missoula, MT
2006 Jun 26 AM 10:13
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ATTORNEY FOR PLAINTIFF
UNITED STATES OF AMERICA

IN THE UNITED STATES COURT
FOR THE DISTRICT OF MONTANA
MISSOULA DIVISION

UNITED STATES OF AMERICA,	)	CR 05-07-MDMW
	)	
	)	SUPERSEDING INDICTMENT
Plaintiff,	)	CONSPIRACY
	)	(Count I)
v.	)	Title 18 U.S.C. §371
	)	(Penalty: Five years imprisonment,
W.R. GRACE; ALAN R.	)	$250,000 fine, and three years
STRINGER; HENRY A.	)	supervised release; $1,000,000 fine
ESCHENBACH; JACK W	)	per violation for organization)
WOLTER; J. MCCAIG;	)	
ROBERT J. BETTACCHI;	)	CLEAN AIR ACT VIOLATIONS
O. MARIO FAVORITO;	)	(Counts II, III, IV)

ROBERT C. WALSH	) Title 42 U.S.C. § 7413(c)(5)(A)
	) Title 18 U.S.C. § 2
Defendants.	) (Penalty: Fifteen years
	) imprisonment, $250,000 fine, and
	) three years supervised release;
	) $1,000,000 fine per violation for
	) organization)
	)
	) OBSTRUCTION OF JUSTICE
	) (Counts V, VI, VII, VIII)
	) 18 U.S.C. §§ 1505, 2 (Penalty: Five
	) years imprisonment, $250,000 fine,
	) and three years supervised release)
	)

THE GRAND JURY CHARGES:

INTRODUCTION

A. BACKGROUND

At all times material to this Indictment:

1. In the late 1800s, gold miners discovered a significant body of vermiculite ore in an area located in the mountains approximately seven miles northeast of the town of Libby, Montana (the "Libby Mine").

2. Vermiculite is a mineral that expands, or pops, at high temperatures in an "expansion" or "exfoliation" process.

3. Expanded vermiculite that originated at the Libby Mine had many uses, including as an attic insulation (marketed as "Zonolite Attic Insulation"), as an ingredient in fireproofing products (marketed as "Monokote"), as an ingredient in masonry fill, and as an additive in potting soils and fertilizers.

4. The vermiculite deposits at the Libby Mine were contaminated with amphibole asbestos. The amphibole asbestos found at the Libby Mine is

composed of a family of closely related minerals including tremolite, winchite, richterite, actinolite and others. This amphibole asbestos has been commonly called "tremolite" and, for the purposes of this Indictment, it will be referred to as "tremolite," tremolite asbestos" and "amphibole asbestos."

5. On or about 1939, the Zonolite Company (originally known as Universal Zonolite Insulation Company) was formed to mine and process vermiculite from the ore deposit at the Libby Mine.

6. Pursuant to the Agreement and Plan of Reorganization dated January 17, 1963, between W.R. Grace & Co., a Connecticut corporation, and the Zonolite Company ("Zonolite Agreement"), W.R. Grace & Co. acquired "substantially all of the properties and assets of Zonolite" under the terms and conditions contained in that agreement.

7. The employees of the Zonolite Company remained at the mine and processing facilities as employees of W.R. Grace & Co.

8. W.R. Grace & Co. operated the Libby Mine until on or about 1992.

9. W.R. Grace & Co. acquired the rights to the name "Zonolite" as part of the transaction with the Zonolite Company and continued to manufacture and sell Zonolite's product line, including vermiculite concentrate, expanded vermiculite, and Zonolite Attic Insulation.

10. In 1988, W.R. Grace & Co., the same Connecticut corporation that entered into the Zonolite Agreement, changed its name to W.R. Grace & Co. - Conn. as part of a corporate reorganization, and became a subsidiary of a newly-created New York corporation named W.R. Grace & Co. In 1998,

W.R. Grace & Co., a Delaware corporation, was incorporated. W.R. Grace & Co. - Conn., became a wholly owned subsidiary of the Delaware corporation.

11. For the purposes of this Indictment, "W.R. GRACE" refers to W.R. Grace & Co., a Connecticut corporation, both before and after it changed its name to W.R. Grace & Co.-Conn. in 1988.

12. As part of its operations, defendant W.R. GRACE mined and milled vermiculite ore at the Libby Mine. The milled vermiculite ore was known as "vermiculite concentrate."

13. As part of its operations, defendant W.R. GRACE disposed of mining waste and mill tailings (a waste product of the milling process) at the Libby Mine.

14. From on or about 1963 until on or about 1991, defendant W.R. GRACE operated a Screening Plant, a processing plant at which vermiculite concentrate was separated into different sized grades through a mechanical screening process (the "Screening Plant").

15. Prior to the mid-1970s, the Screening Plant was located at the Libby Mine.

16. After the mid-1970s, the Screening Plant was located down Rainy Creek Road from the Libby Mine, at the intersection of Highway 37 and Rainy Creek Road on the bank of the Kootenai River, about four miles from Libby, Montana.

17. Prior to the construction of the new Screening Plant at the intersection of Highway 37 and Rainy Creek Road, defendant W.R. GRACE used this property as a holding point for vermiculite

concentrate trucked from the Screening Plant at the Libby Mine.

18. A facility known as the "Export Plant" was located across the railroad tracks from downtown Libby, Montana near where Highway 37 crosses the Kootenai River.

19. From on or about 1963 to at least on or about 1992, defendant W.R. GRACE trucked small amounts (relative to the volume shipped to customers from the rail loading station near the Screening Plant) of vermiculite concentrate to the Export Plant from the Screening Plant, where it was stockpiled and then placed in bags for distribution to locations in other states.

20. Defendant W.R. GRACE shipped the vermiculite concentrate (in hopper railroad cars or, in lesser amounts, in bags) to defendant W.R. GRACE owned and licensed expansion facilities and to customers throughout the United States.

21. In the operation of the Screening Plant, there were occasionally spills, processing errors, or lack of demand for certain size grades of vermiculite concentrate.

22. At various times between 1963 and 1992, defendant W.R. GRACE placed the vermiculite concentrate that had spilled, vermiculite concentrate that was affected by processing errors, or vermiculite concentrate of a grade for which there was no immediate demand in various locations on the grounds of the Screening Plant.

23. At various times between 1963 and 1990, defendant W.R. GRACE allowed employees and residents of Libby, Montana to take vermiculite concentrate for their personal use.

24. At some unknown time in the 1970s, an employee of defendant W.R. GRACE informed the Libby Public School District that vermiculite materials from the Libby Mine could be used as a surface for the Libby High School running track.

25. At some unknown time, employees of defendant W.R. GRACE transported vermiculite materials to the Libby High School and the Libby Junior High School where they were laid and served as a surface for the running tracks at both schools for approximately seven years.

26. On or about 1981, employees of defendant W.R. GRACE transported vermiculite materials to Plummer Elementary School in Libby, Montana where they were laid and served as the foundation for an outdoor ice skating rink.

27. In 1990, defendant W.R. GRACE ceased vermiculite mining at the Libby Mine. Defendant W.R. GRACE continued vermiculite processing operations at the Libby Mine and the Screening Plant until approximately 1992.

28. In the mid-1990s, defendant W.R. GRACE sold several of the properties associated with its former vermiculite operations in and near Libby, Montana.

29. On or about December 17, 1993, defendant W.R. GRACE sold the Screening Plant to Lincoln County residents Mel and Lerah Parker.

30. From approximately 1993 to on or about June, 2000, Mel and Lerah Parker used the Screening Plant for commercial operations (a commercial nursery and mushroom farm) and their personal residence.

31. From on or about 1977 to on or about 1994, the defendant W.R. GRACE leased a portion of the Export Plant to various people and entities to use for organized youth baseball games and practices.

32. From on or about 1987 to sometime before on or about May 12, 1994, defendant W.R. Grace leased a portion of the Export Plant to Jim Regh, Melvin Burnett, and others for use as their place of business.

33. In separate transactions on or about May 12, 1994 and on or about February 23, 1995, defendant W.R. GRACE transferred portions of the former Export Plant property to the City of Libby.

34. From on or about 1995 to on or about 1997, the City of Libby leased a portion of the Export Plant to various people and entities to use for organized youth baseball games and practices.

35. From on or about May 12, 1994 to on or about 2000, the City of Libby leased a portion of the Export Plant to Melvin Burnett, who used the location for a retail lumber yard and related operations.

36. On or about 1994, defendant W.R. GRACE sold to an entity known as Kootenai Development Corporation ("KDC") approximately 3,600 acres of mountainous land that comprises the Libby Mine, 1,200 acres of which had been actively mined, and an approximately 20-acre parcel now known as the "Flyway," which is located between Highway 37 and the Kootenai River, adjacent to and south of the former Screening Plant.

37. On or about November 23, 1999, Environmental Protection Agency ("EPA") representatives arrived in Libby, Montana to

investigate reports of a potential hazardous waste emergency relating to asbestos contaminated vermiculite.

38. As a result of its investigation, EPA concluded that the conditions at the site presented an imminent and substantial threat to human health and the environment. The site was ultimately declared a Superfund Site pursuant to federal law. As of December 31, 2001, EPA had incurred 55,100,000.00 dollars in cleanup costs.

39. At various dates alleged in this Indictment, defendant ALAN R. STRINGER held different positions with defendant W.R. GRACE, including: from on or about September 8, 1981 to on or about 1988, he was the Libby Mine Supervisor; from on or about 1988 to on or about 1994, he was the General Manager of Operations at the Libby Mine; and from on or about 1999 to the present, he served as defendant W.R. GRACE's representative relating to EPA's Superfund Cleanup.

40. At various dates alleged in this Indictment, defendant HENRY "HARRY" A. ESCHENBACH held different positions with defendant W.R. GRACE, including: from on or about 1971 to on or about 1977, he was an Industrial Hygienist in the Industrial Chemicals Group ("ICG"); and from on or about 1977 to on or about December 31, 1996, he was the Director of Health, Safety, and Toxicology for ICG.

41. At various dates alleged in this Indictment, defendant JACK W. WOLTER held different positions with defendant W.R. GRACE, including: from on or about September 15, 1975 to on or about 1988, he was Vice-President of Mining and

Engineering for the Construction Products Division ("CPD"); and from on or about 1988 to on or about 1994, he was Vice-President and General Manager of CPD.

42. At various dates alleged in this Indictment, defendant WILLIAM J. McCAIG held different positions with defendant W.R. GRACE, including: from on or about January, 1971, he was a Maintenance Engineer at the Libby Mine; from on or about 1976 to on or about 1979, he was Maintenance Superintendent at the Libby Mine; from on or about 1979 to on or about 1988, he was General Manager of Operations at the Libby Mine; and from on or about 1988 to on or about August 31, 1995, he was Manufacturing Manager of Specialty Vermiculite of CPD Business Unit in Enoree, South Carolina.

43. At various dates alleged in this Indictment, defendant ROBERT J. BETTACCHI held different positions with defendant W.R. GRACE, including: from on or about 1979 to on or about 1986, he was General Manager of CPD; from on or about 1986 to on or about 1989, he was Vice-President of CPD; and from on or about 1989 to the present, he was President of CPD and Senior Vice-President of defendant W.R. GRACE.

44. At various dates alleged in this Indictment, defendant O. MARIO FAVORITO held different positions with defendant W.R. GRACE, including: from on or about 1970 to on or about 1993, he was corporate legal counsel for ICG; and from an unknown time but no earlier than on or about 1993 to the present, he was Assistant Secretary of defendant W.R. GRACE and Chief Group Counsel.

45. At various dates alleged in this Indictment, defendant ROBERT C. WALSH held different positions with defendant W.R. GRACE, including: from on or about 1982 to on or about 1989, he was President of CPD; from on or about 1989 to an unknown time he was Executive Vice President of Grace Specialty Chemicals Co.; and from an unknown time to on or about 1994, he was Senior Vice-President of defendant W.R. GRACE.

46. From 1976 to 1990 the Directors, Officers, and Shareholders of W.R. GRACE enjoyed at least $140 million in after tax profits arising largely from products made with vermiculite contaminated with tremolite asbestos from the Libby Mine.

B. ASBESTOS RELATED DISEASES

47. Modern science has not established a safe level for asbestos exposure for which there is no increased risk of disease.

48. Airborne exposure to tremolite asbestos by breathing into human lungs causes scarring of the lung tissues and can cause the disease known as "asbestosis."

49. Asbestosis is a progressive disease that destroys the human lung's ability to absorb oxygen, and in severe cases, results in severe disability or death.

50. The rate of asbestosis mortality of the Libby population is 40 to 80 times higher than expected when compared to rates for Montana and the United States.

51. Airborne exposure to tremolite asbestos causes lung cancer in humans.

52. The rate of lung cancer mortality of the Libby population is approximately 30 percent higher than expected when compared to rates for Montana and the United States.

53. Airborne exposure to tremolite asbestos can cause an aggressive and fatal form of cancer in humans known as "mesothelioma." This form of cancer is extremely rare, resulting in no more than 9 cases per 1 million individuals in the United States general population, and is uniquely associated with exposure to asbestos. This form of cancer is not related to cigarette smoking.

54. Over twenty cases of mesothelioma have been identified to date among persons who lived or worked in Libby. This is a significant finding for this small population of approximately 8,000 people.

55. Airborne exposure to tremolite asbestos can cause the disease of pleural fibrosis, which is scarring of the pleural tissues surrounding the lungs. Pleural fibrosis can result in impaired functioning of the lungs, and in more severe cases, disability and death. The development and progression of pleural fibrosis is not related to cigarette smoking.

56. Pleural fibrosis is associated with a greater risk of developing mesothelioma and lung cancer.

57. To date, approximately 1,200 residents of the Libby, Montana area have been identified as having asbestos related pleural abnormalities as a result of being exposed to tremolite asbestos produced by W.R. GRACE at the Libby Mine. Of this group, 70 percent are not former employees at the Libby Mine. Individuals have been identified with asbestos related disease whose only exposure to

asbestos has been through asbestos containing vermiculite from the Libby Mine located throughout the community.

58. Asbestos related diseases have a latency period ranging from 3 to 40 years or more. That is, a person exposed to asbestos by breathing will not manifest symptoms of disease until 3 to 40 or more years after exposure.

59. Airborne exposure to tremolite asbestos can cause bloody pleural effusions. A bloody pleural effusion is a pathological collection of bloody fluid between the pleural lining and the lung. They are considered to be a possible manifestation of early stages of mesothelioma.

C. STATUTORY BACKGROUND

I. CLEAN AIR ACT

60. The Clean Air Act ("CAA"), 42 U.S.C. § 7401 *et seq.*, is the United States' comprehensive air pollution control statute. The purpose of the CAA is "to protect and enhance the quality of the nation's air resources." 42 U.S.C. § 7401(b)(1); *see also* 42 U.S.C. § 7470.

61. Under the CAA, any person who knowingly releases into the ambient air any hazardous air pollutant or any extremely hazardous substance, and who knows at the time that he thereby places another person in imminent danger of death or serious bodily injury is subject to criminal penalties. 42 U.S.C. § 7413(c)(5)(A).

62. Asbestos is a hazardous air pollutant. 42 U.S.C. § 7412(b)(1).

63. A "person" includes a corporation, individual and "any responsible corporate officer." 42 U.S.C. § 7602(e); 42 U.S.C. § 7413(c)(6).

64. Congress defined "serious bodily injury" as "bodily injury which involves a substantial risk of death, . . . extreme physical pain, . . . or protracted loss or impairment of the function of a bodily member, organ, or mental faculty." 42 U.S.C. § 7413(c)(5)(F).

II. TOXIC SUBSTANCES CONTROL ACT

65. The Toxic Substances Control Act, 15 U.S.C. § 2601 et. seq. ("TSCA"), regulates chemical substances and mixtures whose manufacture, processing, distribution in commerce, use, or disposal may present an unreasonable risk of injury to health or the environment.

66. Section 8(e) of TSCA, 15 U.S.C. § 2607(e) requires that any person who manufactures, processes, or distributes in commerce a chemical substance or mixture and who obtains information that reasonably supports the conclusion that such substance or mixture presents a substantial risk of injury to health or the environment shall immediately inform the Administrator of EPA of such information, unless the person has actual knowledge that the Administrator has been adequately informed of such information.

67. At times relevant to this Indictment, EPA interpreted the requirement under TSCA 8(e) that a person "immediately inform" the Administrator to be met if the person submitted the information to EPA within 15 working days after the date the person obtained such information.

III. COMPREHENSIVE ENVIRONMENTAL RESPONSE, COMPENSATION AND LIABILITY ACT (SUPERFUND)

68. The Comprehensive Environmental Response, Compensation and Liability Act, 42 U.S.C. § 9601 et seq. ("CERCLA" or "Superfund"), authorizes designated EPA personnel to conduct response actions to address releases or threatened releases of hazardous substances into the environment. 42 U.S.C. § 9604(a)(1). Asbestos is defined as a "hazardous substance" under CERCLA and EPA's implementing regulations. 42 U.S.C. § 9601(14); 40 C.F.R. 302.4.

69. Under Section 104(e)(2) of CERCLA, 42 U.S.C. § 9604(e)(2), designated EPA personnel "may require any person who has or may have information relevant to any of the following to furnish, upon reasonable notice, information and documents relating to such matter:

(A) The identification, nature, and quantity of materials which have been or are generated, treated, stored, or disposed of at a vessel or facility or transported to a vessel or facility.

(B) The nature or extent of a release or threatened release of a hazardous substance or pollutant or contaminant at or from a vessel or facility.

(C) Information relating to the ability of a person to pay for or perform a cleanup.

COUNT I
(Conspiracy)

70. Paragraphs 1 through 69 are incorporated here as if set forth in full.

71. That beginning on or about 1976, and continuing until on or about 2002, at Libby, and other locations within and without the District of Montana, the defendants, W.R. GRACE, ALAN R. STRINGER, HENRY A. ESCHENBACH, JACK W. WOLTER, WILLIAM J. McCAIG, ROBERT J. BETTACCHI, O. MARIO FAVORITO, and ROBERT C. WALSH, and others known and unknown to the grand jury did knowingly combine, conspire and agree among themselves and others:

OBJECTS OF THE CONSPIRACY

a. To knowingly release and cause to be released into the ambient air a hazardous air pollutant, namely asbestos, and at the time knowingly placed persons, including: families of employees of W.R. GRACE Libby vermiculite mining and processing operations; residents of Libby, Montana and surrounding communities in Lincoln County; and others in imminent danger of death or serious bodily injury in violation of 42 U.S.C. § 7413(c)(5)(A).

b. To defraud the United States and others by impairing, impeding, and frustrating the governmental functions of the United States, including the United States Environmental Protection Agency (EPA) and the Department of Health and Human Services, specifically, the National Institute for Occupational Safety and Health ("NIOSH"); being federal agencies responsible for administering federal laws and

regulations designed to protect public health and safety and the environment in violation of 18 U.S.C.§ 371.

72. It was a purpose of the conspiracy to conceal and misrepresent the hazardous nature of the tremolite asbestos contaminated vermiculite, thereby enriching defendants and others.

73. It was a purpose of the conspiracy to increase profits and avoid liability by misleading the government and preventing the government from using its authorities to protect against risks to human health and the environment associated with the manufacture, processing, distribution, commerce, use, handling, disposal, and release of tremolite asbestos contaminated vermiculite.

MANNER AND MEANS OF THE CONSPIRACY

The following manner and means, among others, were used by the defendants to effectuate and perpetuate the conspiracy set forth above:

74. It was part of the conspiracy that the defendants obtained knowledge of the hazardous nature of the tremolite asbestos contaminated vermiculite through various means, including, but not limited to: scientific testing and analysis, including animal studies; epidemiological studies of employees; employee medical screening and examinations; employee medical record reviews; collection and evaluation of a deceased employee's lung tissue; review of employee death certificates; conducting employee morbidity and mortality studies; employee autopsy reviews; review of medical and scientific literature; reviewing reports from insurance carriers; and reviewing employee worker's compensation claims.

75. It was part of the conspiracy that the defendants obtained knowledge of the propensity of tremolite asbestos contaminated vermiculite, when disturbed, to release fibers into the ambient air (also known as "friability") through various means, including, but not limited to: product testing, including attic simulation and vermiculite materials handling tests ("drop tests"); and air and bulk sampling at the Libby Mine and other defendant W.R. GRACE facilities in and around Libby, Montana, at defendant W.R. GRACE owned and licensed expansion plants, at the facilities of customers using vermiculite materials, and at the Libby High School track.

76. It was part of the conspiracy that the defendants concealed the full extent of their knowledge of the hazardous nature and friability of the tremolite asbestos contaminated vermiculite from employees of defendant W.R. GRACE Libby vermiculite mining and processing operations; families of employees of defendant W.R. GRACE Libby vermiculite mining and processing operations; industrial customers of defendant W.R. GRACE Libby vermiculite products; employees of industrial customers of defendant W.R. GRACE Libby vermiculite products; residents of Libby, Montana and surrounding communities in Lincoln County, Montana; and government authorities.

77. It was part of the conspiracy that the defendants obstructed, impeded, and frustrated the governmental authorities by withholding information regarding the hazardous nature and friability of the tremolite asbestos contaminated vermiculite and asserting that the Libby Mine

operations and Libby vermiculite posed no risk to public health and safety and the environment.

78. It was part of the conspiracy that the defendants marketed and sold tremolite asbestos contaminated vermiculite and products containing tremolite asbestos contaminated vermiculite.

79. It was part of the conspiracy that the defendants sold and leased tremolite asbestos contaminated real property and withheld information about the contamination from the purchasers of the property.

80. It was part of the conspiracy that defendants provided and distributed tremolite asbestos contaminated vermiculite material to the community, resulting in releases of asbestos into the ambient air in and around Libby, Montana and surrounding communities in Lincoln County, Montana.

81. It was part of the conspiracy that defendants caused W.R. GRACE employees and their personal effects and clothing to be contaminated with tremolite asbestos and allowed them to leave the Libby mine with these contaminated clothes, resulting in releases of tremolite asbestos into the ambient air in and around Libby, Montana and surrounding communities in Lincoln County, Montana.

82. It was part of the conspiracy that the defendants falsely described, concealed from, and failed to reveal to the government the hazardous nature and friability of the tremolite asbestos in the Libby vermiculite and the health hazards associated with exposure to tremolite asbestos.

83. It was part of the conspiracy that the defendants obstructed, impaired, impeded, and misled EPA during the course of EPA's emergency response to the asbestos contamination in and around Libby, Montana.

OVERT ACTS

In furtherance of the conspiracy and to effect its objectives, defendants, together with each other and with other persons known and unknown to the grand jury committed numerous overt acts in the District of Montana and elsewhere including, but not limited to, the following:

Eschenbach Study

84. Sometime prior to August 23, 1976, defendant ESCHENBACH gathered information regarding the lung health of defendant W.R. GRACE employees at the Libby Mine. This information was reported by an employee of defendant W.R. GRACE to defendant WOLTER in a memo dated August 23, 1976:

> Statistics provided by Harry Eschenbach indicated of eighteen (18) age sixty-five (65) normal retirements, three (3) had normal chests, one (1) had no records and fourteen (14) had positive lung disease, i.e. either significant scar tissue on the lung or significant fibrosis; there have been five (5) long term disability claims, three (3) of these were employees with six (6) years of service and two (2) with between fifteen (15) and twenty-five (25) years of service. Sixty-three (63) percent of all Libby employees with over ten (10) years of service test positive.

Commission of the Fairleigh Dickinson Animal Toxicology Study (Hamster Study)

85. On or about March 15, 1976, defendants W.R. GRACE and co-conspirators contracted with Dr. William Smith of Fairleigh Dickinson University to conduct animal toxicological studies on Libby Mine tremolite asbestos and vermiculite for 70,000.00 dollars (the "Hamster Study"). The contract between defendant W.R. GRACE and Dr. Smith prohibited Dr. Smith from publishing the results of the study in scientific literature without the permission of defendant W.R. GRACE.

86. From on or about January 1977 through approximately October 1977, Dr. Smith and an employee of defendant W.R. GRACE provided regular status reports to defendants W.R. GRACE, FAVORITO, ESCHENBACH, and WOLTER on the findings of the Hamster Study showing progressive evidence of asbestos related lung disease, including a significant incidence of mesothelioma.

87. On or about May 25, 1978, Dr. Smith provided defendant W.R. GRACE a preliminary draft Final Report of the Hamster Study. The draft report concluded that 10 hamsters had died of mesothelioma, and that the findings of tumors were evidence that tremolite asbestos fibers in the sizes tested were carcinogenic (caused cancer).

88. A consultant hired by defendant W.R. GRACE revised Dr. Smith's preliminary draft Final Report including the removal of the statement that the findings of tumors in response to tremolite asbestos fibers were evidence that tremolite asbestos fibers in the sizes tested were carcinogenic (caused

cancer). Defendant W.R. GRACE did not grant Dr. Smith permission to publish the results of the study in scientific literature.

The Enbionics Review

89. On or about March 29, 1977, an employee of defendant W.R. GRACE wrote a memo directing another employee of defendant W.R. GRACE to coordinate a meeting to discuss a professional epidemiological study of defendant W.R. GRACE employees exposed to tremolite asbestos fibers. Defendants ESCHENBACH, WOLTER and FAVORITO were copied on the memo. According to the memo, two of the goals of the epidemiological study were to develop a methodology for tracking improvements in employees' health that may result from improvement in dust controls at the Libby Mine and to determine the risk of developing cancer through analysis of cause of death from selected groups of past employees.

90. On or about March 30, 1977, defendant ESCHENBACH responded to the March 29, 1977 memo regarding the proposed epidemiological study, warning that such a study would likely become public knowledge and should not be initiated unless "they [defendant W.R. GRACE] are prepared to deal with that situation."

91. On or about July 1977, defendants W.R. GRACE and ESCHENBACH hired Enbionics, a consulting firm specializing in epidemiological studies, to review employee x-rays from defendant W.R. GRACE vermiculite mines in Libby, Montana and Enoree, South Carolina.

92. On or about August 25, 1978, defendants W.R. GRACE and ESCHENBACH received Enbionics' report, which stated:

> As you indicated before the project began, there is a substantial difference in the attack rates of asbestos and possible asbestos disease between the South Carolina and Montana facilities. In fact, we had only one case of clear asbestos disease in South Carolina and a few cases of possible asbestos disease. There are numerous cases of asbestos disease in Montana. The incidence of disease is independent of age, since there are a number of quite young individuals with obvious asbestos disease in Montana. Probably the difference lies in total exposure, fiber size, and mineral form.

The Libby Facility Audit Report

93. In a memo dated May 14, 1981 to defendant WOLTER, a member of defendant W.R. GRACE's Corporate Facility Audit staff confirmed that an internal audit was to be conducted of the Libby Mine operations during June 1981.

94. Defendants WOLTER and McCAIG were responsible for an overall review of the draft audit report.

95. Defendants ESCHENBACH and FAVORITO were responsible for reviewing the portion of the draft audit report relating to health effects at the Libby Mine.

96. In the Facility Audit report dated June 1981, a review of workers' x-rays was conducted. The report stated:

> An analysis was run on the data to determine the impact of the wet process operation over the past five years on lung abnormalities vis-a-vis the period 1968 through 1975 with dry operations. Again the point is conceded that there are data inadequacies insofar as statistical analysis is concerned, but a trend may be perceived. Data shows an incidence of 45.1% abnormalities for five year employees during the dry mill operations (1968 through 1975) as compared to 38.4% for five year employees during the wet mill operations (1976 through 1980).

97. The report also found, based upon 1980 data, that "[e]ach additional year of tremolite exposure for an employee adds a significant 1.5 percent to the incidence of abnormal x-rays."

O.M. Scott Employees' Bloody Pleural Effusions

98. On or about November 4, 1980, defendant FAVORITO disseminated to defendant W.R. GRACE senior management, including defendant ESCHENBACH, a file produced by NIOSH. That file included information concerning "a bloody pleural effusions problem" among employees of O.M. Scott at its Marysville, Ohio facility, where vermiculite ore from the Libby Mine was processed.

99. On or about November 12, 1980, a defendant W.R. GRACE senior manager wrote a memo to other defendant W.R. GRACE senior managers, including defendants FAVORITO and WOLTER, summarizing a meeting he had with O.M. Scott management wherein O.M. Scott expressed its intention to discontinue use of Libby ore due to the asbestos contamination.

100. On or about December 11, 1981, an employee of defendant W.R. GRACE wrote a memo to defendant W.R. GRACE senior managers, including defendants WOLTER, BETTACCHI, ESCHENBACH, and FAVORITO advising them that two employees of O.M. Scott were suing defendant W.R. GRACE alleging injury from exposure to tremolite asbestos.

101. On or about May 27, 1983, defendant WOLTER wrote a memo to defendant W.R. GRACE senior management, including defendants ESCHENBACH and WALSH, inviting them to attend a meeting with Dr. James Lockey to hear the results of Lockey's study of O.M. Scott employees. The memo referenced Dr. Lockey's articles summarizing the health effects of vermiculite exposure and the pulmonary hazards of tremolite contaminated vermiculite. The memo also referenced Dr. Lockey's "knowledge of the exposures and health knowledge of the O.M. Scott employees, twelve of which are reported to have bloody pleural effusions, alleged to be caused by tremolite exposure at the O.M. Scott plant in Marysville, Ohio."

102. On or about June 3, 1983, Dr. Lockey met with W.R. Grace senior management in Cambridge, Massachusetts and advised them of his conclusion that the bloody pleural effusion problem at O.M. Scott Company was caused by employee exposure to defendant W.R. GRACE's tremolite asbestos contaminated vermiculite concentrate from the Libby Mine.

Monson Mortality Study

103. On or about April 5, 1982, defendants W.R. GRACE and ESCHENBACH hired Richard R.

Monson, M.D., of Harvard University's School of Public Health to conduct a mortality study of persons employed at the Libby Mine from 1950 to 1981. Dr. Monson collected 66 death certificates and examined the cause of death listed. Dr. Monson concluded and reported to defendants W.R. GRACE and ESCHENBACH that an excessive number of employees at the Libby Mine had died of cancer of the respiratory system including mesothelioma.

104. On or about July 28, 1982, defendant ESCHENBACH provided copies of the mortality study done by Dr. Monson on W.R. GRACE employees at the Libby Mine to defendant W.R. GRACE senior management, including defendants FAVORITO, McCAIG and WOLTER. In his memo, defendant ESCHENBACH stated, "Our major problem is death from respiratory cancer. This is no surprise."

The NIOSH Study

105. On or about November 26, 1980, an employee of defendant W.R. GRACE wrote a memo to defendant FAVORITO, copied to defendant WOLTER, describing a November 24, 1980 meeting with NIOSH representatives, which was attended by defendants ESCHENBACH and FAVORITO. The purpose of the meeting was to discuss NIOSH's proposed epidemiological study of Libby, and the memo concluded by listing defendant W.R. GRACE's options for responding to NIOSH's proposed study. The options and recommendations were as follows:

> (a) Obstruct and block, possibly even contesting in the courts. As I understand it, we'd lose and this is not exactly the image we try to project.

(b) Be slow, review things extensively and contribute to delay. This might not be bad policy generally and it is possible that the new Administration's policies will make NIOSH more selective in how scarce staff resources are allocated after January 20, 1981.

(c) Publish a "preemptive epidemiological study". This could attenuate the resume-enhancement potential for NIOSH study personnel. This could also be a checkpoint for a subsequent NIOSH study when it is released.

(d) Cooperate fully. This agency and its personnel have not always acted with high levels of professionalism on past studies. This option would save NIOSH time and effort, make their study more comprehensive and possibly rule out some inaccuracies. It would not necessarily make NIOSH's conclusions any more responsible.

(e) Actively go upstream in NIOSH to personally repeat the same arguments, the first time immediately after receipt of protocol.

(f) Actively seek to turn off the sources of the pressure for the study by personally repeating the same arguments. However, the sources may have supplementary reasons not fully shared with NIOSH.

(g) Attempt to apply influence via congressmen, senators, lobbyists or others to get it turned off. This might result in delay without turning it off. However, it is not necessarily successful, can backfire, and to be

effective must be developed over long periods of time due to the trust required.

There are other options as well. All should be discussed. At this time I tend to favor a phased combination of (b), (c), (e), and (f).

106. In a February 11, 1981 letter to Dr. Daniel Banks of NIOSH, defendant

FAVORITO questioned the need for NIOSH's proposed study:

During our meeting on November 24th, we indicated to you that the vermiculite ore as mined at Grace's Libby, Montana mine is found along with asbestiform tremolite contamination. Any study of vermiculite conducted in such environment can only lead to inconclusive results. This fact makes any study at Libby, Montana of questionable use, especially as it relates to NIOSH's avowed purpose of evaluating exposure to "pure vermiculite." We believe that any study at Libby will amount to nothing more than yet another verification of what is already known, viz., that excessive exposure to asbestiform material is dangerous to health. NIOSH must reconsider whether it is in anyone's best interest for it to expend scarce public funds in such redundant pursuits.

107. From on or about November 14, 1980, when NIOSH requested information regarding the Libby Mine to begin its proposed study, to at least on or about June 1981, defendant W.R. GRACE was unwilling to release the data requested.

108. On or about March 23, 1981, defendant FAVORITO informed NIOSH that defendant W.R.

GRACE planned to present its position regarding the proposed NIOSH study to a higher government authority.

109. In a June 29, 1981 letter to the Acting Deputy Assistant Secretary for United States Mine Safety and Health, defendant FAVORITO questioned the utility of NIOSH's proposed study, stating that "to mount a study to assess the results of possible exposure to vermiculite appears completely unjustified given the fact that to our knowledge there is no credible evidence that adverse health effects follow from exposure to vermiculite itself," and that "utilization of Libby, Montana as a locus to study exposure to vermiculite would be a wasteful and redundant expenditure of scarce Government manpower, money and effort . . ."

110. On or about July 28, 1982, defendant ESCHENBACH provided copies of the Monson Mortality Study to defendant W.R. GRACE senior management, including defendants FAVORITO, McCAIG, and WOLTER. In his memo, defendant ESCHENBACH stated, "Our major problem is death from respiratory cancer. This is no surprise." The memo further stated, "NIOSH would possibly not pursue the mortality portion of their study if we provided this information to them."

111. On or about March 29, 1983, defendants W.R. GRACE, WALSH, WOLTER, and ESCHENBACH began negotiations with Drs. John Corbett McDonald and Alison D. McDonald of the McGill University School of Occupational Health regarding a W.R. GRACE sponsored mortality and morbidity study of its employees at the Libby Mine. Defendant WALSH copied defendants WOLTER,

ESCHENBACH and FAVORITO on the initial letter to McDonald.

112. On or about May 5, 1983, defendant ESCHENBACH disseminated to defendant W.R. GRACE senior managers, including defendants WALSH, FAVORITO and WOLTER a summary of a meeting with the Drs. McDonald regarding the proposed McGill study.

113. On or about June 15, 1983, defendants W.R. GRACE and ESCHENBACH, in response to an April 25, 1983 EPA request for additional information regarding the health effects of exposure to asbestos for all workers, informed EPA that a thorough evaluation of current employees would be part of the McGill University (McDonald, et. al.) epidemiological study.

114. On or about October 18, 1983, defendant ESCHENBACH wrote a memo to defendant WALSH, with copies to defendant W.R. GRACE senior management, including defendants McCAIG and WOLTER summarizing the study of "McNair's lung." McNair was a former employee of defendant W.R. GRACE at the Libby Mine. As related by defendant ESCHENBACH, the McGill researcher determined that "the uncoated fiber size distribution in McNair's lung was remarkably similar to that which is found when analyzing air samples from Libby."

Drop, Drum Transfer, Attic Simulation Tests, and Survey of Commercial Users of Expanded Vermiculite

115. Beginning on or about 1977, and continuing through 1982, defendant W.R. GRACE conducted "drop tests" to determine whether tremolite asbestos

Mine to begin its proposed study, to at least on or about June 1981, defendant W.R. GRACE was unwilling to release the data requested.

108. On or about March 23, 1981, defendant FAVORITO informed NIOSH that defendant W.R. GRACE planned to present its position regarding the proposed NIOSH study to a higher government authority.

109. In a June 29, 1981 letter to the Acting Deputy Assistant Secretary for United States Mine Safety and Health, defendant FAVORITO questioned the utility of NIOSH's proposed study, stating that "to mount a study to assess the results of possible exposure to vermiculite appears completely unjustified given the fact that to our knowledge there is no credible evidence that adverse health effects follow from exposure to vermiculite itself," and that "utilization of Libby, Montana as a locus to study exposure to vermiculite would be a wasteful and redundant expenditure of scarce Government manpower, money and effort . . ."

110. On or about July 28, 1982, defendant ESCHENBACH provided copies of the Monson Mortality Study to defendant W.R. GRACE senior management, including defendants FAVORITO, McCAIG, and WOLTER. In his memo, defendant ESCHENBACH stated, "Our major problem is death from respiratory cancer. This is no surprise." The memo further stated, "NIOSH would possibly not pursue the mortality portion of their study if we provided this information to them."

111. On or about March 29, 1983, defendants W.R. GRACE, WALSH, WOLTER, and ESCHENBACH began negotiations with Drs. John

used expanded vermiculite from the Libby Mine for agricultural and industrial purposes.

122. As part of this survey, defendant W.R. GRACE conducted personnel air monitoring of the employees at its customers' facilities to determine the level of airborne asbestos fiber releases generated during activities such as unloading bags of the vermiculite, emptying the vermiculite into containers, mixing the vermiculite with other materials, and bagging products made with the vermiculite.

123. Defendant W.R. GRACE also analyzed bulk samples taken from the expanded vermiculite from the Libby Mine used by its customers, as well as its customers' products made with the vermiculite.

124. As stated by CPD, the objective of this analysis was to "collect data on tremolite content on vermiculite products used by CPD customers." The purpose was to determine the "correlation between user personnel exposure to Tremolite at job site and % Tremolite in Vermiculite used and/or product produced."

125. The results of the survey revealed to defendant W.R. GRACE that the expanded vermiculite contained small amounts of tremolite asbestos, sometimes as low as 0.01% by weight.

126. The results of the survey also revealed to defendant W.R. GRACE that the expanded vermiculite released high levels of asbestos fibers from routine occupational activities, even when the tremolite content was minimal. For example, at one fertilizer production facility, the "time weighted average" ("TWA") fiber exposure for two workers emptying bags of vermiculite was 6.83 fibers per

cubic centimeter (f/cc) and 7.8 f/cc, which exceeded the regulatory limit of TWA 2.0 f/cc established by the Occupational Safety and Health Administration (OSHA) then in effect. The bulk samples from this facility showed that the tremolite asbestos content was 0.039% by weight.

127. Defendants WOLTER and ESCHENBACH received a copy of the sampling results from the survey.

Failure to Disclose Under Toxic Substances Control Act Section 8(e)

128. Defendants W.R. GRACE and ESCHENBACH failed to disclose to EPA information required by TSCA 8(e) within 15 days of receiving that information.

129. In response to EPA's request for information pursuant to TSCA 8(e), defendants W.R. GRACE and ESCHENBACH sent EPA a letter on March 24, 1983. In this notification, defendants W.R. GRACE and ESCHENBACH failed to disclose to EPA the Hamster Study, the Enbionics review, and the Monson/Harvard Mortality study, among other information required by TSCA 8(e).

130. In the March 24, 1983 TSCA submittal to EPA, defendants W.R. GRACE and ESCHENBACH falsely stated that the known information demonstrated their products as currently manufactured did not create a substantial risk and that they had "no reason to believe, there is any risk associated with the current uses of Libby vermiculite-containing products."

131. On or about March 4, 1986, defendants W.R. GRACE and ESCHENBACH submitted to EPA the documents summarizing the McGill and NIOSH

studies and falsely stated that these documents contained all information requested by EPA. As in 1983, defendants W.R. GRACE and ESCHENBACH failed to disclose all information required by TSCA 8(e).

132. On or about April 1, 1992, defendants W.R. GRACE and ESCHENBACH submitted to EPA the Hamster study under a TSCA 8(e) "compliance audit program" (amnesty program). At that time, defendants W.R. GRACE and ESCHENBACH again did not submit all information they were required to submit under TSCA 8(e).

Exposure to the Libby Community

133. From on or about 1977 until on or about 1993, defendant W.R. GRACE gave away vermiculite materials contaminated with tremolite asbestos to the Libby community without disclosing the hazardous nature of the material.

134. On or about August 23, 1976, an employee of defendant W.R. GRACE wrote a memo to defendant WOLTER, that stated:

> Request the ICG Safety and Health Group conduct an intensive study to determine the level of tremolite in the environment, that is at the mine or work location and in town. This study should be conducted under a variety of temperature, wind, and atmospheric conditions to determine precise levels of tremolite fibers in the air and in turn the exact magnitude of the problem. If the threshold limit values...exceed the MESA/OSHA standards in town and the surrounding area(s) and therefore pose a serious hazard to the town's population, we

would then be best advised to develop a program to improve/eliminate problem areas before taking steps to discourage or forbid smoking on mine property.

135. On or about May 24, 1977, a defendant W.R. GRACE manager wrote, in an appendix to a memo copied to defendant W.R. GRACE senior management and defendant WOLTER, that the health of asbestos workers' families was adversely affected by exposure to asbestos dust carried home by workers and that the level of contamination in the home was not a low level.

136. On or about February 22, 1978, an employee of defendant W.R. GRACE wrote a memo to defendant WOLTER, copied to defendant W.R. GRACE senior management including defendant FAVORITO, with editorial changes for a pamphlet proposed to be distributed to Libby Mine employees warning of possible asbestos hazards at their workplace, including the hazard that take-home dust posed to family members. In this memo, the employee recommended that existing stocks of the pamphlet be destroyed.

137. On or about March 19, 1979, local Libby physician Richard Irons wrote a letter to defendant W.R. GRACE expressing concern about the health of Libby Mine workers and their families and the health effects of take-home dust. In the letter, Dr. Irons proposed conducting a health study. On or about April 10, 1979, defendants W.R. GRACE and ESCHENBACH wrote a memo to Libby management, copied to defendant WOLTER regarding Dr. Irons' proposed study. In the memo, defendant ESCHENBACH stated, "Irons is turning the screw. . . We either play the game his way or he

is going to blow the whistle." Defendants W.R. GRACE and ESCHENBACH declined Dr. Irons' proposed study.

138. On or about July 15, 1983, defendant McCAIG wrote a memo informing defendant WOLTER that a local doctor had seen an "asbestos related pattern" in the chest x-rays of the general Libby public and that another local doctor had observed one or two cases of asbestos related disease that the doctor "suspected might have resulted from exposure carried home by employees." Defendant McCAIG's memo summarized discussions within defendant W.R. GRACE concerning the possible institution of a mandatory uniform and shower policy to eliminate take-home dust. Defendant McCAIG concluded by saying that "a uniform and shower policy is unwarranted since adverse effects cannot be definitively proven and would only cause unwarranted fear or concern among employees and the Libby community."

139. On or about 1977, through on or about 1992, defendant W.R. GRACE failed to provide workers with adequate changing and shower facilities that would have minimized take-home dust and exposure to tremolite asbestos to the families of defendant W.R. GRACE's employees.

140. On or about March 19, 1984, defendant ESCHENBACH wrote a memo informing defendant W.R. GRACE senior management, including defendant FAVORITO, of a study published concerning dogs contracting mesothelioma from asbestos dust brought home on the clothes of asbestos workers.

Placement of Mill Tailings at Libby Schools

141. On or about 1981, defendants W.R. GRACE and McCAIG provided mill tailings to the Plummer Elementary School for use as a foundation for an outdoor ice skating rink.

142. On or about 1981, defendant W.R. GRACE employee Earl Lovick informed the Plummer Elementary School Principal that vermiculite materials should not be used as a foundation for the ice skating rink. Lovick failed to disclose to the principal that the vermiculite materials contained tremolite asbestos.

143. From on or about 1981 and continuing through 2000, defendant W.R. GRACE failed to completely remove vermiculite materials contaminated with tremolite asbestos from the Plummer Elementary School ice skating rink.

144. From on or about 1976 through on or about 1981, defendant W.R. GRACE provided mill tailings to the Libby Public School District for use on the Junior and Senior High School running tracks.

145. On or about 1981, defendant W.R. GRACE and defendant McCAIG directed an employee of defendant W.R. GRACE to collect and analyze air samples from the Libby High School running track.

146. On or about July 8, 1981, an employee of defendant W.R. GRACE notified defendant McCAIG in writing that he had collected and analyzed personal air samples while running at the Libby High School running track, the results of which showed "surprisingly high" fiber concentrations, and stated further that "concentrations as high as 1.0 f/cc could result when the track is in a well used

condition and is being used by a large number of people."

147. On or about July 27, 1981, defendant WOLTER informed his supervisor in writing of the situation involving the Libby High School running track and requested authority for the removal and replacement of the "mill coarse tailings" at an estimated cost to defendant W.R. GRACE of 18,000.00 to 20,000.00 dollars.

148. On or about July 31, 1981, defendants W.R. GRACE, WOLTER and McCAIG authorized 20,000.00 dollars to resurface the Libby Junior and Senior High School running tracks, which according to the authorization were "surfaced with coarse tails refuse which contains high concentrations of tremolite asbestos."

149. From on or about 1981 and continuing through 2000, defendants W.R. GRACE, McCAIG, WOLTER, and STRINGER failed to completely remove vermiculite materials contaminated with tremolite asbestos from the Libby Junior and Senior High School tracks.

Negotiations and Marketing of W.R. GRACE Properties

150. On or about July 17, 1990, an employee of defendant W.R. GRACE wrote a memo to defendant BETTACCHI, copied to defendant FAVORITO, informing them that 3M Company ("3M") was interested in acquiring the Libby Mine.

151. On or about April 17, 1991, an employee of defendant W.R. GRACE wrote a memo to defendant BETTACCHI, copied to defendant FAVORITO, describing 3M's renewed interest in purchasing the

Libby Mine. Defendant STRINGER provided a site tour to 3M representatives during the negotiations.

152. On or about November 11, 1991, an employee of defendant W.R. GRACE wrote a memo to defendants FAVORITO, BETTACCHI and WOLTER transmitting a letter from 3M, which stated that 3M was no longer interested in purchasing the Libby Mine based upon evidence of "potential environmental problems."

153. In a letter dated April 18, 1991 to defendant STRINGER, the Phelps Dodge Mining Company ("Phelps Dodge") advised defendant STRINGER that "the property is not of interest" to Phelps Dodge, and that "the presence of so much asbestos was the main factor for declining the property."

154. In a memo dated May 13, 1991, copied to defendants BETTACCHI, STRINGER and WOLTER, under the heading "Libby Update," an employee of defendant W.R. GRACE stated, "Libby received a letter from Phelps Dodge indicating 'no interest at this time' in pursuing any exploration of the Rainey Creek intrusive. The concern was excessive asbestos."

155. On or about July 14, 1993, defendant WOLTER wrote a memo to defendant W.R. GRACE senior management, copied to defendant BETTACCHI, describing defendant W.R. GRACE's assets in Libby. Attached to the memo was a July 6, 1993 memo to defendant WOLTER with an analysis of sales options prepared by defendant STRINGER that stated:

> For the same reasons that 3M would not buy the mine, I doubt that any other large corporation will come forward with an offer to

buy the entire property. If Grace is going to be able to transfer all of the future responsibilities and liabilities to someone else, they are going to have to be willing to sell to some small organization.

Export Plant Property (Baseball Fields)

156. From on or about 1977 and continuing until on or about 1994, knowing the Export Plant property was contaminated with tremolite asbestos, defendant W.R. GRACE leased said property to various people and entities to use for organized youth baseball games and practices.

157. On or about March 9, 1993, defendants W.R. GRACE and STRINGER, knowing the Export Plant property was contaminated with tremolite asbestos, stated in a letter to the Mayor of Libby that it was "W.R. GRACE and Co's intent to donate to the city of Libby" the Export Plant property.

158. On or about February 23, 1995, defendants W.R. GRACE, BETTACCHI and FAVORITO, knowing the Export Plant property was contaminated with tremolite asbestos, signed a deed transferring title of the Export Plant property to the City of Libby without disclosing to the city the health hazard associated with said property.

Export Plant Property (Commercial Buildings)

159. On or about 1987, defendants W.R. GRACE and McCAIG, knowing the Export Plant property was contaminated with tremolite asbestos, leased a portion of said property to Mon-Ida, a business owned by James Regh, and failed to disclose the health hazard associated with said property.

160. On or about October 1, 1989, and continuing until approximately 1994, defendants W.R. GRACE and STRINGER knowing the Export Plant property was contaminated with tremolite asbestos, leased a portion of said property to Millwork West, a business owned by Melvin Burnett, and failed to disclose the health hazard associated with said property.

161. On or about May 12, 1994, defendants W.R. GRACE, BETTACCHI and FAVORITO, knowing the Export Plant property was contaminated with tremolite asbestos, signed a deed transferring title of the Export Plant property to the City of Libby without disclosing to the city the health hazard associated with said property.

162. From on or about May 12, 1994, defendants W.R. GRACE, STRINGER, BETTACCHI, and FAVORITO failed to disclose the health hazard associated with the tremolite asbestos contamination of the property to the City of Libby and the occupants of said property.

Sale of the Screening Plant Property to Parkers

163. On or about October 1992, defendants W.R. GRACE and STRINGER approached the Parkers and offered the Screening Plant property for sale.

164. On or about December 9, 1992, defendants W.R. GRACE and STRINGER signed an Agreement to Sell and Purchase, effecting the sale of the Screening Plant property to the Parkers.

165. On or about December 17, 1993, defendants W.R. GRACE and BETTACCHI knowing the Screening Plant property was contaminated with tremolite asbestos, signed a deed transferring title of the Screening Plant property to the Parkers and

failed to disclose the health hazard associated with said property.

166. Beginning on or about December 17, 1993, defendants W.R. GRACE, BETTACCHI and STRINGER, knowing the Screening Plant property was contaminated with tremolite asbestos and knowing that the Parkers resided on and established a commercial nursery on said property, failed to disclose the health hazard associated with said property.

167. On or about April 19, 2000, subsequent to EPA notifying the Parkers of the potential contamination of their property, defendants W.R. GRACE and STRINGER delivered a check for 40,000.00 dollars to the Parkers.

Property Transactions with KDC

168. On or about October 17, 1994, defendants W.R. GRACE and BETTACCHI executed a Purchase and Sales Contract with Kootenai Development Company ("KDC") wherein defendant W.R. GRACE sold the properties known as the "Mine Site" and the "Flyway."

169. Sometime after October 17, 1994 but before July 14, 2000, defendant WOLTER became a shareholder in KDC by investing approximately 600.00 dollars.

170. On or about July 14, 2000, defendant W.R. GRACE, knowing that EPA was negotiating with KDC to use the mine site to return the contaminated materials removed from the community, signed a Stock Purchase Agreement wherein defendant W.R. GRACE agreed to purchase all the stock shares of KDC, thereby obtaining control over the property

known as the "Mine Site," the "Flyway" and the "Bluffs."

171. On or about July 14, 2000, defendant W.R. GRACE paid approximately 2,323,685.62 dollars to the principals of KDC pursuant to the Stock Purchase Agreement referred to in ¶ 170. As payment for his shares in KDC, defendant WOLTER received approximately 1.13 million dollars from defendant W.R. GRACE.

172. On or about July 18, 2000, defendant W.R. GRACE denied the EPA Superfund Emergency Response Team access to the property known as the "Mine Site," the "Flyway" and the "Bluffs."

Knowing Endangerment of EPA Employees and the Libby Community and Obstruction of EPA's Superfund Clean-Up

173. On or about November 23, 1999, defendants W.R. GRACE and STRINGER told the EPA On-Scene Coordinator that Libby Mine vermiculite concentrate at the Export Plant and at the Screening Plant contained less than one percent tremolite asbestos, thereby concealing the true hazardous nature of the asbestos contamination, delaying EPA's investigation and causing releases of asbestos into the air in the Libby community.

174. On or about November 23, 1999, defendants W.R. GRACE and STRINGER told the EPA On-Scene Coordinator that historical asbestos contamination problems at the Libby Mine had been resolved and provided one page of air monitoring data gathered during closure of the mine site to demonstrate that current conditions were safe, thereby concealing the true extent and hazardous nature of the asbestos contamination, delaying

EPA's investigation and causing releases of asbestos into the air in the Libby community.

175. From on or about November 23, 1999 through approximately spring of 2000, defendants W.R. GRACE and STRINGER led EPA employees and contractors associated with EPA's Superfund cleanup, to various locations that were contaminated with tremolite asbestos, including: the "Mine Site," "Rainy Creek Road," the "Screening Plant," the "Flyway" and the "Export Plant," thereby disturbing and causing to be disturbed asbestos-contaminated vermiculite, releasing asbestos into the air, all without disclosing the extent and hazardous nature of the asbestos contamination at these locations.

176. On or about February 22, 2000, defendants W.R. GRACE and STRINGER responded to an EPA CERCLA 104(e) Request For Information regarding the "Libby Asbestos Site" and provided the following false and misleading information: that defendant W.R. GRACE did not provide vermiculite contaminated with tremolite asbestos to the general public in Libby, thereby concealing the true extent of the asbestos contamination, delaying EPA's investigation and causing releases of asbestos into the air in the Libby community.

177. On or about February 22, 2000, defendants W.R. GRACE and STRINGER responded to an EPA CERCLA 104(e) Request For Information regarding the "Libby Asbestos Site" and failed to inform EPA that defendant W.R. GRACE had donated vermiculite mill coarse tailings contaminated with tremolite asbestos to Libby public schools for surfacing the Junior High School running track, thereby concealing the true location of the asbestos contamination, delaying EPA's investigation and

causing releases of asbestos into the air in the Libby community.

178. On or about February 22, 2000, defendants W.R. GRACE and STRINGER responded to an EPA CERCLA 104(e) Request For Information regarding the "Libby Asbestos Site" and failed to inform EPA that defendant W.R. GRACE had donated vermiculite mill coarse tailings contaminated with tremolite asbestos to the Libby Public School District for the foundation of the Plummer Elementary School outdoor ice skating rink, thereby concealing the true location of the asbestos contamination, delaying EPA's investigation and causing releases of asbestos into the air in the Libby community.

179. On or about February 22, 2000, defendants W.R. GRACE and STRINGER responded to an EPA CERCLA 104(e) Request For Information regarding the "Libby Asbestos Site" and failed to disclose that defendant W.R. GRACE used waste materials contaminated with tremolite asbestos to "sand" Rainy Creek Road, thereby concealing the true extent and hazardous nature of the asbestos contamination, delaying EPA's investigation and causing releases of asbestos into the air in the Libby community.

180. On or about February 22, 2000, defendants W.R. GRACE and STRINGER responded to an EPA CERCLA 104(e) Request For Information regarding the "Libby Asbestos Site" and failed to disclose all locations where asbestos contaminated vermiculite materials were located, including: the "Flyway" and the "Bluffs," thereby concealing the true location of the asbestos contamination, delaying EPA's investigation and causing releases of asbestos into the air in the Libby community.

181. On or about February 22, 2000, defendants W.R. GRACE and STRINGER responded to an EPA CERCLA 104(e) Request For Information regarding the "Libby Asbestos Site" and provided the following false and misleading information: that defendant W.R. GRACE employees did not regularly leave the facility with dust contaminated with tremolite asbestos on their clothing.

182. On or about February 22, 2000, defendants W.R. GRACE and STRINGER responded to an EPA CERCLA 104(e) Request For Information regarding the "Libby Asbestos Site" and failed to disclose all air and environmental media sampling information, thereby concealing the true extent and hazardous nature of the asbestos contamination, delaying EPA's investigation and causing releases of asbestos into the air in the Libby community.

183. On or about February 22, 2000, defendants W.R. GRACE and STRINGER responded to an EPA CERCLA 104(e) Request For Information regarding the "Libby Asbestos Site" and failed to disclose the existence and dispositions of the following waste streams, among others: "Stoner Rock" and waste vermiculite concentrate, thereby concealing the true locations of the asbestos contamination, delaying EPA's investigation and causing releases of asbestos into the air in the Libby community.

W.R. Grace Letter to EPA Administrator

184. On or about April 10, 2002, in response to a proposal by EPA to declare a "public health emergency" for the City of Libby that would allow EPA to remove asbestos containing attic insulation from homes in Libby, defendant W.R. GRACE, in a

letter to the Administrator of EPA, stated the following:

(i) "Grace's expanded vermiculite, which was used in ZAI, poses no risk to human health or the environment;"

(ii) ". . . [ZAI] contains biologically insignificant amounts of respirable asbestos fibers;"

(iii) ". . . it is reasonable to expect that disturbance of [ZAI] will not result in hazardous levels of airborne asbestos fibers;" and

(iv) ". . . there is no credible reason to believe that ZAI has ever caused an asbestos-related disease in anyone who has used in his/her home."

In violation of 18 U.S.C. § 371.

COUNT II
(Clean Air Act - Knowing Endangerment)

185. Paragraphs 1 through 69 and 84 through 184 are incorporated by reference as if realleged in full.

186. That beginning on or about November 3, 1999, and continuing until on or about February 3, 2005, at Libby, within the State and District of Montana, defendant W.R. GRACE did knowingly release and caused to be released into the ambient air a hazardous air pollutant, namely, asbestos, and at the time, knowingly placed another person, namely the residents of the town of Libby and Lincoln County in imminent danger of death or serious bodily injury by providing and distributing asbestos contaminated vermiculite material to the community; and by causing defendant W.R. GRACE

employees and their personal effects to be contaminated with asbestos, in violation of 42 U.S.C. § 7413(c)(5)(A), 18 U.S.C. § 2.

COUNT III
(Clean Air Act - Knowing Endangerment)

187. Paragraphs 1 through 69 and 84 through 184 are incorporated by reference as if realleged in full.

188. That beginning on or about November 3, 1999 and continuing until on or about June 15, 2000, at Libby within the State and District of Montana, the defendants, W.R. GRACE, ALAN R. STRINGER, JACK W. WOLTER, and ROBERT J. BETTACCHI did knowingly release and caused to be released into the ambient air a hazardous air pollutant, namely, asbestos, and at the time knowingly placed another person in imminent danger of death or serious bodily injury by selling real property known as the "Screening Plant" to the Parker family, in violation of 42 U.S.C. § 7413(c)(5)(A), 18 U.S.C. § 2.

COUNT IV
(Clean Air Act - Knowing Endangerment)

189. Paragraphs 1 through 69 and 84 through 184 are incorporated by reference as if realleged in full.

190. That beginning on or about November 3, 1999, and continuing until on or about the summer of 2000, at Libby within the State and District of Montana, the defendants, W.R. GRACE, ALAN R. STRINGER, JACK W. WOLTER, and ROBERT J. BETTACCHI did knowingly release and caused to be released into the ambient air a hazardous air pollutant, namely, asbestos, and at the time knowingly placed another person in imminent

danger of death or serious bodily injury by leasing a property known as the "Export Plant" to the Burnetts and selling the property known as the "Export Plant" to the City of Libby, in violation of 42 U.S.C. § 7413(c)(5)(A), 18 U.S.C. § 2.

COUNT V
(Obstruction of Justice)

191. Paragraphs 1 through 69 and 84 through 184 are incorporated by reference as if realleged in full.

192. On or about November 23, 1999, in the District of Montana, defendants W.R. GRACE and ALAN R. STRINGER, did corruptly obstruct, impede, and endeavor to influence, obstruct, and impede the due and proper administration of the law under which a pending proceeding was being had before the United States Environmental Protection Agency, an agency of the United States, by providing the following false and misleading information to the United States Environmental Protection Agency, to wit: that W.R. GRACE's vermiculite concentrate contained less than one percent tremolite asbestos and that historical asbestos contamination problems at the Libby mine had been resolved. In violation of 18 U.S.C. §§ 1505 and 1515(b), and 18 U.S.C. § 2.

COUNT VI
(Obstruction of Justice)

193. Paragraphs 1 through 69 and 84 through 184 are incorporated by reference as if realleged in full.

194. On or about February 22, 2000, in the District of Montana, defendants W.R. GRACE and ALAN R. STRINGER, did corruptly obstruct, impede, and endeavor to influence, obstruct, and

impede the due and proper administration of the law under which a pending proceeding was being had before the United States Environmental Protection Agency, an agency of the United States, by providing to the United States Environmental Protection Agency false and misleading information in defendant W.R. GRACE's response to an EPA CERCLA 104(e) Request for Information, to wit:

1. that W.R. GRACE did not provide vermiculite to the general public;

2. that W.R. GRACE employees did not regularly leave the mine with tremolite dust on their clothing;

3. that W.R. GRACE only informed EPA that it had provided vermiculite mill coarse tailings for use on the Libby High School running track, when in truth and in fact, W.R. GRACE had placed vermiculite mill coarse tailings at the Libby Junior High School running track and at the Plummer Elementary School ice skating rink;

4. that W.R. GRACE took actions to treat the roadway to the mine to minimize dust created by vehicular traffic, when in truth and in fact, W.R. GRACE used vermiculite mill tailings, to construct, surface and sand the roadway; and

5. that W.R. GRACE failed to inform EPA of air and environmental media sampling studies and results.

In violation of. 18 U.S.C. §§ 1505 and 1515(b), and 18 U.S.C. § 2.

COUNT VII
(Obstruction of Justice)

195. Paragraphs 1 through 69 and 84 through 184 are incorporated by reference as if realleged in full.

196. On or about July 18, 2000, in the District of Montana, defendants W.R. GRACE and ALAN R. STRINGER, did corruptly obstruct, impede, and endeavor to influence, obstruct, and impede the due and proper administration of the law under which a pending proceeding was being had before the United States Environmental Protection Agency, an agency of the United States, by denying the EPA Superfund Emergency Response Team access to the property known as the "Mine Site," the "Flyway" and the "Bluffs." In violation of 18 U.S.C. §§ 1505 and 1515(b), and 18 U.S.C. § 2.

COUNT VIII
(Obstruction of Justice)

197. Paragraphs 1 through 69 and 84 through 184 are incorporated by reference as if realleged in full.

198. On or about April 10, 2002, in the District of Montana, defendant W.R. GRACE did corruptly obstruct, impede, and endeavor to influence, obstruct, and impede the due and proper administration of the law under which a pending proceeding was being had before the United States Environmental Protection Agency, an agency of the United States, by providing the following false and misleading information to the United States Environmental Protection Agency, to wit: in a letter to the Administrator of the EPA, stated the following: "Grace's expanded vermiculite, which was

used in ZAI, poses no risk to human health or the environment" ". . . [ZAI] contains biologically insignificant amounts of respirable asbestos fibers;" ". . . it is reasonable to expect that disturbance of [ZAI] will not result in hazardous levels of airborne asbestos fibers;" and ". . . there is no credible reason to believe that ZAI has ever caused an asbestos-related disease in anyone who has used in his/her home." In violation of 18 U.S.C. §§ 1505 and 1515(b), and 18 U.S.C. § 2.

A TRUE BILL.

/s/

Foreperson

/s/

William W. Mercer
United States Attorney

/s/

Carl E. Rostad
Criminal Chief Assistant U.S. Attorney

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Nos. 07-1286, 07-1287

IN THE

Supreme Court of the United States

W.R. GRACE & CO.,
Petitioner,

v.

UNITED STATES,
Respondent.

HENRY A. ESCHENBACH, ET AL.,
Petitioners,

v.

UNITED STATES,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS, NATIONAL ASSOCIATION OF MANUFACTURERS, AND AMERICAN CHEMISTRY COUNCIL AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

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Crandon v. United States,
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Hanousek v. United States,
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Liparota v. United States,
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Ratzlaf v. United States,
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Staples v. United States,
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United States v. Hopkins,
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United States v. Plaza Health Labs., Inc.,
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United States v. Sinskey,
119 F.3d 712 (8th Cir. 1997) 21

United States v. United States Gypsum Co.,
438 U.S. 422 (1978) 23

United States v. Weintraub,
273 F.3d 139 (2d Cir. 2001) 20, 21

United States v. Weitzenhoff,
35 F.3d 1275 (9th Cir. 1993) 6, 20, 21

United States v. Wilson,
133 F.3d 251 (4th Cir. 1997) 19, 20

Statutes and Regulations

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18 U.S.C. § 3288 ..... 5, 24, 25

29 U.S.C. § 651(b) 13

33 U.S.C. § 1319(b) 19

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33 U.S.C. § 1362(6) 21

42 U.S.C. § 4321 13

42 U.S.C. § 6928(d) 19

42 U.S.C. § 7413(c) 18, 19

40 C.F.R. §§ 50-97 18

40 C.F.R. §§ 100-149 18

40 C.F.R. §§ 400-699 18

40 C.F.R. §§ 260-282 18

Other Authorities

AMERICAN BAR ASS'N, THE FEDERALIZATION OF CRIMINAL LAW (1998) 13, 14, 15

Anderson, *The Environmental Revolution at Twenty-Five*, 26 RUTGERS L.J. 395 (1995) 18

Baker, *Measuring the Explosive Growth of Federal Crime Legislation*, THE FEDERALIST SOC'Y FOR LAW & PUBLIC POLICY STUDIES (2005) 14

Barker, *Environmental Crimes, Prosecutorial Discretion, and the Civil/Criminal Line*, 88 VA. L. REV. 1387 (2002) 19

Barkow, *The Ascent of the Administrative State and the Demise of Mercy*, 121 HARV. L. REV. 1332 (2008) 13

Barstow & Bergman, *With Little Fanfare, a New Effort to Prosecute Employers that Flout Safety Laws*, N.Y. TIMES, May 2, 2005 7

BLACK'S LAW DICTIONARY (8th ed. 2004) 16

Coffee, *Paradigms Lost: The Blurring of the Criminal and Civil Law Models*, 71 YALE L.J. 1875 (1992) 14

Fact Sheet: President's Corporate Task Force Marks Five Years of Ensuring Corporate Integrity, U.S. Dep't of Justice (July 17, 2007) 7

Huff, *Wrongful Conviction: Causes and Public Policy Issues*, CRIM. JUST., Spring 2003 8

Lazarus, *Meeting the Demands of Integration in the Evolution of Environmental Law: Reforming Environmental Criminal Law*, 83 GEO. L.J. 2407 (1995) 12, 17, 18, 20, 21

Luna, *The Overcriminalization Phenomenon*, 54 AM. U. L. REV. 703 (2005) 8, 15

Lundin, *Sentencing Trends in Environmental Law: An "Informed" Public Response*, 5 FORDHAM ENVTL. L.J. 43 (1993) 7, 14

Rosenzweig, The Heritage Foundation, *The Over-Criminalization of Social and Economic Conduct* (April 17, 2003) 13, 16, 19, 22

Scott & Stuntz, *Plea Bargaining as Contract*, 101 YALE L.J. 1909 (1992) 8

Stuntz, *Substance, Process, and the Civil-Criminal Line*, 7 J. CONTEMP. LEGAL ISSUES 1 (1996) 7, 8

Wright, *Trial Distortion and the End of Innocence in Federal Criminal Justice*, 154 U. PA. L. REV. 79 (2005) 8

BRIEF OF THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS, NATIONAL ASSOCIATION OF MANUFACTURERS, AND AMERICAN CHEMISTRY COUNCIL AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

INTEREST OF THE *AMICI CURIAE*

The National Association of Criminal Defense Lawyers (NACDL) is a non-profit organization with direct national membership of over 10,000 attorneys, in addition to more than 28,000 affiliate members from all 50 states. NACDL is the only professional bar association that represents public defenders and private criminal defense lawyers at the national level. NACDL's mission is to ensure justice and due process for the accused; to foster the integrity, independence, and expertise of the criminal defense profession; and to promote the proper and fair administration of justice. NACDL routinely files *amicus curiae* briefs in this Court and other courts throughout the country.[1]

The National Association of Manufacturers (NAM) is the nation's largest industrial trade association, representing small and large manufacturers in every industrial sector and in all

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[1] The parties have consented to the filing of this brief. Counsel of record for all parties received notice at least 10 days prior to the due date of the *amici curiae*'s intention to file this brief. No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No persons other than *amici curiae*, its members, or its counsel made a monetary contribution to its preparation or submission.

50 states. The NAM's mission is to enhance the competitiveness of manufacturers by shaping a legislative and regulatory environment conducive to economic growth and to increase understanding among policymakers, the media, and the general public about the vital role of manufacturing to American's economic future and living standards.

The American Chemistry Council (ACC) represents the leading companies engaged in the business of chemistry. ACC members apply the science of chemistry to create innovative products and services that make people's lives better, healthier, and safer. The business of chemistry is a $664 billion enterprise and a key element of the nation's economy. Safety and security have always been primary concerns of ACC members, and they work closely with government agencies to improve security and defend against any threat to the nation's infrastructure.

INTRODUCTION AND SUMMARY OF ARGUMENT

1. The federal government indicted petitioners W.R. Grace and certain of its employees for violating the Clean Air Act (CAA) by releasing a substance constituting or comprising "asbestos" into the ambient air. Petitioners argued, and the district court agreed, that this substance did not qualify as a "hazardous air pollutant" under Environmental Protection Agency (EPA) definitions applicable to both the civil regulatory scheme and, by incorporation, the criminal enforcement provisions. The Ninth Circuit reversed, holding that the term "asbestos" describes something

different – *and far broader* – in a CAA criminal prosecution than the EPA's long-standing definition of the same term. In so holding, the Ninth Circuit committed two significant errors, each meriting review.

First, the Ninth Circuit's decision all but ensures that corporate defendants or indicted employees will receive substantially harsher treatment than their counterparts in other Circuits for the same offense. In the Ninth Circuit, smart prosecutors will now indict, try, and convict – or, more likely, use newfound leverage to secure pleas from – defendants for actions not proscribed by the plain text of any regulation. Actual ignorance of the regulatory prohibition, however vague, will not be a defense. Neither fair notice requirements nor the rule of lenity will apply. Rather, for defendants generally familiar with the regulated substance, activity, or industry, culpable knowledge of the previously unannounced line between legal and illegal conduct will simply be presumed.

The questions presented in this case reach fundamental tenets of criminal enforcement and civil regulation, including:

- due process demands fair notice of the threshold dividing prohibited from permitted conduct;
- courts construing criminal statutes must resolve ambiguities in favor of defendants (i.e., the rule of lenity);

- common law principles cannot enlarge the scope of criminal liability fixed by statute;
- statutes or regulations must mean what they say and must not change based on the identity or characteristics of particular defendants; and
- all accused persons must be treated equally without stereotype, bias, or regard for the accident of geography.

The Ninth Circuit has broken from these venerable principles, subjecting regulated communities to disparate (and virtually unlimited) risk of criminal liability for public welfare offenses. This will have a staggering impact on American industry.

Specifically, and second, the Ninth Circuit's decision jeopardizes the viability of numerous highly-regulated industries already heavily burdened by federal criminal oversight. By collapsing the bright line between legal and illegal conduct and reducing the quantum of criminal intent the government must prove to secure a conviction, the Ninth Circuit has invited inefficient over-investment in regulatory compliance beyond that which the law actually requires. To avoid harsh criminal penalties for inadvertent transgressions of indeterminate standards – the *mens rea* historically reserved for amelioration in tort – companies will now spend far more on prevention than Congress or the EPA ever

intended, reducing competitiveness, and, ultimately, competition, in the affected industries.

This Court's review is thus necessary to restore the few fundamental protections criminal defendants accused of environmental violations had before the Ninth Circuit ran roughshod over them.

2. The Ninth Circuit's decision merits certiorari review for another reason, as well: it substantially weakens protections against untimely prosecutions for those accused of regulatory crimes – a class of defendants already burdened by the Ninth Circuit's retreat from basic tenets of criminal law.

The Ninth Circuit ignored district court's unambiguous finding that the initial indictment violated the statute of limitations because it "failed to allege an overt act in furtherance of the knowing endangerment object within the limitations period." By holding that 18 U.S.C. § 3288 does not bar the return of a superseding indictment where the original indictment was, as here, "time-barred," the decision misunderstands § 3288 to create a distinction between "time-barred" and "timely-filed," effectively writing the limitation out of the statute for these defendants. As a result, prosecutors in the Ninth Circuit may now bring numerous prophylactic indictments alleging generic elements against anyone under suspicion, effectively extending the statutory period by six months in every case.

ARGUMENT

A. Public Welfare Offenses Subject Regulated Communities In The Ninth Circuit To Boundless Risk Of Disparate Penalties Without Traditional Protections.

1. The public welfare offense doctrine – under which individuals can be found guilty with a reduced *mens rea* requirement for handling "dangerous and deleterious devices" that "will be assumed to alert an individual that he stands in responsible relation to a public danger" – "almost uniformly involved statutes that provided for only light penalties such as fines or short jail sentences, not imprisonment in the state penitentiary." *Staples v. United States*, 511 U.S. 600, 612 n.6, 616 (1994); *accord Morissette v. United States*, 342 U.S. 246, 256 (1952) (public welfare offense "penalties commonly are relatively small, and conviction does no grave damage to an offender's reputation"). Under environmental statutes like the CAA and the Federal Sentencing Guidelines, however, companies and individuals who transgress an environmental regulation – even unknowingly – may be guilty of a felony punishable by years of imprisonment. For example, a defendant in an earlier Ninth Circuit case received 33 months imprisonment for discharging 6% more sewage than his permit allowed. *United States v. Weitzenhoff*, 35 F.3d 1275, 1282, 1296 (9th Cir. 1993).

Despite the availability of a wide range of civil and administrative enforcement mechanisms, federal regulators are increasingly turning to

criminal prosecution of the environmental laws.[2] *See* Lundin, *Sentencing Trends in Environmental Law: An "Informed" Public Response*, 5 FORDHAM ENVTL. L.J. 43, 48-51 (1993) (describing trend toward increased environmental prosecutions and longer prison sentences). This trend shows no sign of abating – in fact, the government has recently expanded the reach of environmental enforcement into the workplace. *See* Barstow & Bergman, *With Little Fanfare, a New Effort to Prosecute Employers that Flout Safety Laws*, N.Y. TIMES, May 2, 2005, at A17 (DOJ announcing interagency partnership with EPA and OSHA to prosecute workplace safety violations by using environmental laws).

2. These harsh penalties mixed with the government's decreased burden of proving *mens rea*, as detailed *infra* at 15-22, create immense pressure on defendants to accept plea bargains. The easier a case is to try, the more power a prosecutor wields in plea negotiations: "[c]ases that would be risky in litigation if the crime were defined precisely become fairly easy, meaning that charges the defendant would otherwise contest turn into pleas." Stuntz, *Substance, Process, and the*

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[2] This phenomenon is not limited to environmental laws. Government officials have also stepped up prosecutions for corporate fraud. In 2007, for example, the President's Corporate Fraud Task Force announced its "remarkable results": in five years, it had secured convictions for 1,236 individuals, including 214 CEOs and presidents, 53 CFOs, 23 corporate counsels, and 129 vice-presidents. Fact Sheet: President's Corporate Task Force Marks Five Years of Ensuring Corporate Integrity, U.S. Dep't of Justice (July 17, 2007), *available at* http://www.usdoj.gov/opa/pr/2007/July/07_odag_507.html.

Civil-Criminal Line, 7 J. CONTEMP. LEGAL ISSUES 1, 15 (1996); *see also* Luna, *The Overcriminalization Phenomenon*, 54 AM. U. L. REV. 703, 724 (2005) (increasing potential punishment allows prosecutors "to wield a bigger stick throughout the criminal process, and often leaves the accused little choice but to accept a plea bargain").[3] The more power a prosecutor has to induce a plea agreement, the more concentrated governmental authority becomes because, as commentators have observed, plea bargaining "*is* the criminal justice system." Scott & Stuntz, *Plea Bargaining as Contract*, 101 YALE L.J. 1909, 1912 (1992) (emphasis in original); *see also* Wright, *Trial Distortion and the End of Innocence in Federal Criminal Justice*, 154 U. PA. L. REV. 79, 90-91 (2005) (about 95% of federal criminal cases are resolved by guilty pleas).

3. Both before and after a defendant is swept into the criminal system for regulatory violations, the deck is stacked against her. The probability is high that she will receive a multi-year prison sentence, even if she did not know her actions violated the law and, after the Ninth Circuit's decision here, even if she could not have known. The Ninth Circuit's decision turns the existing legal labyrinth into something even more one-sided, effectively eliminating long-standing procedural

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[3] Studies have shown that *innocent* criminal defendants can be more likely to agree to a plea deal. Huff, *Wrongful Conviction: Causes and Public Policy Issues*, CRIM. JUST., Spring 2003, at 15, 17 (in psychological experiment, "innocent 'defendants' were more likely to accept plea bargains when they faced a number of charges or when the probable severity of punishment was great").

protections for those accused of regulatory infractions.

First, the decision nullifies the principle that due process entitles defendants to fair warning of the conduct that can give rise to criminal liability. Many American industries are already subject to pervasive regulation. The governing regulations are often highly technical, and their requirements can be difficult to ascertain, even for experts. But now, in the Ninth Circuit, the government may prosecute companies and their employees for acts that are not even covered by the text of any regulation but are, at most, somehow merely similar in nature.

Second, the decision impermissibly applies common law principles to enlarge the scope of criminal liability fixed by statutory or regulatory text. The meaning of environmental laws must be determinate, not variable according to the whim of prosecutors or the identity of defendants. Here, even a defendant who manages to penetrate thousands of pages of regulations might still be handed an indictment if the government decides, after the fact, that an otherwise on-point civil regulatory definition does not apply to his conduct – even where, as here, the criminal provision incorporates the civil definition rather than providing one of its own.

Instead, the prosecutor can select his own definition, which, in the present case, was the definition of "asbestos" found in the Chemical Abstract Service (CAS), a private database accessible only to paid subscribers. W.R. Grace Pet.

13. Alternatively, a court can, without citation, offer its own definition, previously unknown and unknowable to the defendant. App. (No. 07-1286), at 16a-17a. There is no refuge, nothing to provide actual or constructive notice, even for the most diligent and innocent-minded defendant who is otherwise engaging in socially productive conduct. This gives prosecutors even more power to bring charges and secure convictions, thus increasing the pressure on defendants to negotiate plea agreements.

In the instant case, the Ninth Circuit held that, because defendants are "an industrial chemical company and seven of its top executives" who "are all familiar with asbestos," they had "actual notice" and "have known of the health risks posed by . . . their products." *Id.* at 17a.[4] While a defendant's professional background might have some bearing on whether he should have known that a particular substance was a pollutant subject to regulation, it is wholly irrelevant to a statute's or regulation's definition of *what* a pollutant is. A defendant's background does not change what it is that Congress and the EPA *intended to – and actually did – regulate.*

"Because construction of a criminal statute must be guided by the need for fair warning, it is rare that legislative history or statutory policies will support a construction of a statute broader than that clearly warranted by the text." *Crandon v.*

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[4] Because there is no factual record in this case – only an indictment – the Ninth Circuit had no basis for making these assumptions about defendants.

United States, 494 U.S. 152, 160 (1990); *see also United States v. Lanier*, 520 U.S. 259, 266 (1997) ("due process bars courts from applying a novel construction of a criminal statute to conduct that neither the statute nor any prior judicial decision has fairly disclosed to be within its scope"). It should be rarer still for a court's own conception of what constitutes a "hazardous air pollutant" to displace, and broaden, the EPA's own published and properly promulgated definition. Nevertheless, the Ninth Circuit has accomplished just that, and in so doing countenanced virtually boundless liability for regulatory crimes.

Third, the Ninth Circuit has abandoned the rule of lenity, the application of which should not hinge on a defendant's subjective characteristics. *See* App. (No. 07-1286), at 17a. When a criminal statute does not, as here, unambiguously cover the accused's conduct, the rule of lenity gives the benefit of the doubt to the defendant. It is a "time-honored interpretive guideline" that "ensures that criminal statutes will provide fair warning concerning conduct rendered illegal and strikes the appropriate balance between the legislature, the prosecutor, and the court in defining criminal liability." *Liparota v. United States*, 471 U.S. 419, 427 (1985). A statute is either ambiguous or it is not – neither the clarity of Congress' intent nor its words in a criminal statute change from defendant to defendant.

"In our era of multiplying new federal crimes" – and, one might add, ever growing and complex regulations – "there is more reason than ever to

give this ancient canon of construction consistent application." *Bryan v. United States*, 524 U.S. 184, 205 (1998) (Scalia, J., dissenting). This is especially true for environmental crimes: "when the environmental protection requirements upon which . . . violations are based are too obscure or indeterminate[,] the applicable law should be read in a light more favorable to the criminal defendant." Lazarus, *Meeting the Demands of Integration in the Evolution of Environmental Law: Reforming Environmental Criminal Law*, 83 GEO. L.J. 2407, 2526 (1995). Indeed, "the problems intended to be redressed by the rule of lenity are especially pronounced in the environmental law context." *Id.* at 2527. In contrast to the Ninth Circuit, other courts of appeals have properly recognized that "[t]he fact that [a] case involves pollution does not make the rule of lenity inapplicable." *United States v. Borowski*, 977 F.2d 27, 32 n.9 (1st Cir. 1992) (applying rule of lenity to Clean Water Act); *accord United States v. Plaza Health Labs., Inc.*, 3 F.3d 643, 649 (2d Cir. 1993).

B. Industries Are Subject To Vast Statutory And Regulatory Schemes, Many Of Which Create Potential Criminal Liability.

The scope of American industry already subject to highly intrusive federal civil regulation and direct criminal enforcement is breathtaking. There are now "several hundred federal agencies, charged with everything from 'assur[ing] so far as possible every working man and woman in the nation safe and healthful working conditions and preserv[ing] our human resources' to creating 'a national policy

which will encourage productive and enjoyable harmony between man and his environment.'" Barkow, *The Ascent of the Administrative State and the Demise of Mercy*, 121 HARV. L. REV. 1332, 1337-38 (2008) (quoting 29 U.S.C. § 651(b) (OSHA) and 42 U.S.C. § 4321 (EPA)). These agencies manage industries comprising a vital share of our domestic economy, including manufacturing, transportation and shipping, finance and banking, energy and mining, health care, pharmaceuticals, agriculture, and more.

The long arm and stubborn complexity of this civil regulatory scheme may be matched only by the rapidly expanding reach of federal criminal laws to new regulatory domains, a mode of enforcement traditionally reserved to the States. No precise count of the number of federal statutory crimes exists. Charged with the task of enumerating them, the American Bar Association's Task Force on the Federalization of Crime essentially gave up, stating that it "may be impossible to determine exactly how many federal crimes could be prosecuted" – "[s]o large is the present body of federal criminal law that there is no conveniently accessible, complete list of federal crimes." AMERICAN BAR ASS'N, THE FEDERALIZATION OF CRIMINAL LAW 2, 9 (1998) (hereinafter "ABA Task Force"). These laws are "scattered in over 50 titles of the United States Code, encompassing roughly 27,000 pages." Rosenzweig, The Heritage Foundation, *The Over-Criminalization of Social and Economic Conduct* (April 17, 2003), *republished in* CHAMPION, Aug. 2003, at *29.

Nevertheless, it is safe to say that thousands of acts (or omissions) are subject to criminal sanction by the federal government – and that number is growing. After an exhaustive analysis, one commentator concluded that "[t]here are *over 4,000 offenses* that carry criminal penalties in the United States Code." Baker, *Measuring the Explosive Growth of Federal Crime Legislation*, THE FEDERALIST SOC'Y FOR LAW & PUBLIC POLICY STUDIES, at 3 (2005) (emphasis added). That number reflects a one-third increase since 1980. *Id.* Environmental crimes accounted for a "substantial number" of the federal criminal statutes enacted from 1998 to 2005. *Id.* Indeed, prior to the 1980s, all but the most egregious environmental violations received administrative or civil sanction. *See* Lundin, *supra*, at 48.

Such figures do not even include administrative regulations. Federal criminal laws impacting economic activity often incorporate regulations promulgated by the agencies charged with implementing the statutes and impose criminal liability for violating the same. The ABA Task Force estimated that as of 1996, the federal government could impose sanctions, many of which would be criminal, for nearly 10,000 regulations – and that is likely a conservative figure. ABA Task Force, *supra*, at 10; *see also* Coffee, *Paradigms Lost: The Blurring of the Criminal and Civil Law Models*, 71 YALE L.J. 1875, 1881 (1992) (early 1990s estimate that "the number of federal regulations currently punishable by criminal penalties [is] over 300,000"). "Whatever the exact number of crimes that comprise today's 'federal criminal law,' it is

clear that the amount of individual citizen behavior now potentially subject to federal criminal control has increased in astonishing proportions in the last few decades." ABA Task Force, *supra*, at 10.

C. A Relaxed *Mens Rea* Requirement Leaves Regulated Communities Vulnerable To Prosecution And Invites Inefficient Over-Investment in Compliance.

The convergence of the federal government's civil regulatory role with its vast expansion into the criminal sphere has already harmed regulated communities. "[The] rise of the modern administrative state [has] erect[ed] a vast legal labyrinth buttressed by criminal penalties in areas ranging from environmental protection and securities regulation to product and workplace safety." Luna, *supra*, at 708-09.

That twin enforcement system captures acts (or omissions) that may not be inherently evil and which, to the contrary, frequently occur in the context of socially and economically beneficial activities. Proof that the defendant knew she was violating the law is rarely required; a mere inadvertence can sometimes result in a felony conviction. Thus, coupled with the sheer volume of regulations – many of which are, at best, incredibly complex – the cost of compliance is high. Yet, the cost has thus far been determinate; what any given law required was usually ascertainable. No longer in the Ninth Circuit. Its decision here allows prosecutors to impute knowledge of illegality to defendants before the illegal subject matter is even

identified, increasing the burden of compliance to the breaking point.

1. Acts giving rise to regulatory criminal liability are unlike traditional, common law crimes. They are wrongful not because of their intrinsic nature – like murder, arson, or rape (*malum in se*) – but rather because the law says they are (*malum prohibitum*). BLACK'S LAW DICTIONARY 978-79 (8th ed. 2004) (*malum prohibitum* is "a[n] act that is a crime merely because it is prohibited by statute, although the act itself is not necessarily immoral"). Thus, "many statutes punish those whose acts are wrongful only by virtue of legislative" – or agency – "determination." Rosenzweig, *supra*, at *30. As a result, individuals are less likely to realize when their actions cross the line from permissible to criminal. This is especially true when the laws are technical and complex.

For example, this Court has observed that the "highly technical" tax code and banking laws "present[] the danger of ensnaring individuals engaged in apparently innocent conduct." *Bryan*, 524 U.S. at 194. Both sets of laws "sometimes criminalize conduct that would not strike an ordinary citizen as immoral or likely unlawful. Thus, both sets of laws may lead to the unfair result of criminally prosecuting individuals who subjectively and honestly believe they have not acted criminally." *United States v. Aversa*, 984 F.2d 493, 502 (1st Cir. 1993) (en banc) (Breyer, J., concurring); *see also Arthur Anderson LLP v. United States*, 544 U.S. 696, 703-04 (2005) ("the act underlying the conviction – 'persuasion' – is by

itself innocuous . . . 'persuading' a person 'with intent to . . . cause' that person to 'withhold' testimony or documents from . . . Government official[s] is not inherently malign") (quoting 18 U.S.C. § 1512(b)); *Ratzlaf v. United States*, 510 U.S. 135, 144 (1994) ("currency structuring is not inevitably nefarious").

These concerns are magnified in the environmental realm, particularly because environmental laws are frequently empirical. Because "[t]here are rarely any clear threshold levels at which environmental pollution becomes unacceptable," the laws "draw[] lines that tend to be based on fairly arbitrary distinctions [and] turn on questions of degree that are, at best, gray at the border." Lazarus, *supra*, at 2431. "It is rarely self-evident[] on which side of the border one lies." *Id.* Moreover, because "[m]any socially beneficial activities cause pollution, either indirectly or directly," environmental laws often do not prohibit the release of substances in their entirety; rather, the laws govern "where, when, and how much" one can discharge – "the difference between being on just one side of the line rather than just on the other side is likely to be negligible," but the legal consequences can be tremendous. *Id.* at 2422, 2431.

Not only are the lines between permissible and illegal not intuitive in environmental law, but they are incredibly complex and technical. Even experts in the field refer to environmental law's "extraordinary complexity" and note that "the quantity of minutely detailed language in modern environmental law beggars description." *Id.* at 2423

(collecting citations). "[A]lthough criminal law requires clear, determinate, and readily accessible legal standards, familiar to the general public, environmental law is replete with obscure . . . and highly technical standards, the meaning of which few can claim genuine mastery." *Id.* at 2445.

2. There are approximately 16,000 pages of regulations for the three major environmental statutes – the Clean Air Act, Clean Water Act (CWA), and Resource Conservation and Recovery Act (RCRA). *See* 40 C.F.R. §§ 50-97 (CAA); 40 C.F.R. §§ 100-149, 400-699 (CWA); 40 C.F.R. §§ 260-282 (RCRA). *See also* Anderson, *The Environmental Revolution at Twenty-Five*, 26 RUTGERS L.J. 395, 413 (1995) (environmental regulations in Code of Federal Regulations measure over thee-and-a-half feet tall).[5]

Individuals need not know that their conduct violates *any* of these regulations to be subject to potential criminal liability. The CAA, CWA, and RCRA criminalize almost all knowing violations of a regulation, including discharging a substance without a permit when one is required, failing to comply with a permit condition, or failing to meet recording and reporting requirements. 42 U.S.C.

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[5] The EPA also drafts preambles to its regulatory schemes that do not appear in the Code of Federal Regulations, but provide detailed guidance as to how the agency plans to implement specific laws. These preambles can be lengthier than the rules themselves. For example, the regulations setting forth the definition of "solid waste" were a few pages of the Federal Register; the EPA's preamble explaining those regulations covered 54 pages. Lazarus, *supra*, at 2437 (citing 50 Fed. Reg. 614 (1985)).

§ 7413(c)(1)-(2); 33 U.S.C. § 1319(c)(2); 42 U.S.C. § 6928(d). To determine the scope of criminal liability, one must not only consult the statute, but also decipher the underlying regulations that form the basis for the statute's civil regulatory scheme. "This structure creates [a] broad criminal net, which piggybacks on the full range of environmental regulations." Barker, *Environmental Crimes, Prosecutorial Discretion, and the Civil/Criminal Line*, 88 VA. L. REV. 1387, 1393 (2002); *see also* Rosenzweig, *supra*, at *35 ("Identically phrased statutes are often applicable to the same conduct – one authorizing a civil penalty and the other a criminal sanction.") (citing 33 U.S.C. § 1319(g) (authorizing administrative penalties for CWA violations), § 1319(b),(d) (civil penalties), and § 1319(c) (criminal penalties)).

The requirement that a violation be "knowing" is all that stands between a civil or administrative sanction and a felony conviction. As one commentator has noted, however, that line is a "parchment barrier," Rosenzweig, *supra*, at *33, because courts of appeals have held that a "knowing" *mens rea* does not require that the defendant actually know he is breaking the law. Put another way, the "knowing" *mens rea* standard in environmental statutes "requires not that a defendant know that his conduct was illegal, but only that he know the facts that make his conduct illegal." *United States v. Wilson*, 133 F.3d 251, 262 (4th Cir. 1997) (quotations omitted). The "government need not prove that the defendants understood the legal consequences of those facts or were even aware of the existence of the law

granting them significance." *Id.* at 264.[6] In other words, to secure a felony conviction, the government need only prove that a defendant knew she was discharging a pollutant. A defendant who honestly, but incorrectly, believed that she – or her employer – had a permit to do so has no defense. *E.g.*, *United States v. Weitzenhoff*, 35 F.3d 1275, 1286 (9th Cir. 1993) (defendants could not interpose "lack of knowledge" defense where permitted sewage discharge exceeded allowable levels by 6%; knowledge of discharge alone satisfied *mens rea* standard);[7] *United States v. Hopkins*, 53 F.3d 533, 541 (2d Cir. 1995) (government needed to prove only that defendant "knew the nature of his acts and performed them intentionally, but [not] that he knew that those acts violated the CWA, or any particular provision of that law, or the regulatory permit").

Similarly, by invoking the traditional public welfare offense doctrine, courts of appeals have also held that a defendant who knowingly discharged a pollutant, but did not know he needed a permit to do so, acted "knowingly." *E.g.*, *United States v.*

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[6] *See also* Lazarus, *supra*, at 2469 ("Without exception, the courts agree that the criminal penalty provisions in [environmental statutes] that require that a person 'knowingly violates' do not require the government to prove that the defendant was actually aware of the applicable environmental standard.").

[7] "The only thing [the defendants] have to know to be guilty is that they were dumping sewage into the ocean, yet that was a lawful activity expressly authorized by their federal permit." *Weitzenhoff*, 35 F.3d at 1294 (Kleinfeld, J., dissenting from denial of rehearing en banc).

Weintraub, 273 F.3d 139, 147 (2d Cir. 2001). For a public welfare offense, a defendant has the requisite *mens rea* if he simply "knows that he is dealing with a dangerous devise of a character that places him in responsible relation to a public danger, [and] should be alerted to the probability of strict regulation." *Staples*, 511 U.S. at 607 (quotations and citation omitted). *See, e.g., United States v. Sinskey*, 119 F.3d 712, 715-16 (8th Cir. 1997) (CWA, invoking public offense doctrine); *Hopkins*, 53 F.3d at 537-39 (same); *Weitzenhoff*, 35 F.3d at 1284-86 (same). Thus, the government need not prove that a defendant knew a substance was covered by a regulation – only that the defendant had a general sense that the substance was a pollutant.

Of course, not all pollutants are self-evidently pollutants as defined by statute or regulation: hot water, rock, and sand are "pollutants" under the CWA. 33 U.S.C. § 1362(6); *see also* Lazarus, *supra*, at 2479 ("pollutants subject to the federal environmental statutes are not . . . confined to those that are especially dangerous"). And, to hold that "any statute can be described as creating a public welfare offense so long as the statute regulates conduct that is known to be subject to extensive regulation and that may involve a risk to the community . . . would extend th[e] narrow [public welfare offense] doctrine to virtually any criminal statute applicable to industrial activities." *Hanousek v. United States*, 528 U.S. 1102, 120 S. Ct. 860, 861 (2000) (Thomas, J., dissenting from denial of certiorari).

In short, an individual can act "knowingly" even without any specific intent to do a wrongful act or to violate a legal duty that is set forth amid thousands of pages of dense, highly technical regulations – regulations that even agency officials might not understand.

3. The Ninth Circuit's interpretation of the CAA's knowing endangerment section relaxes prosecutors' burden of proving intent even further. As the law currently stands, "in regulated industries, those who participate in the industry are presumed to know all of the intricate regulatory arcana that govern their conduct. As a consequence, the only requirement imposed by requiring proof that one has acted 'knowingly' is that the government must demonstrate that the defendant has purposefully done the act constituting the offense – and *in the context of regulated economic conduct that showing is trivial.*" Rosenzweig, *supra*, at *33-*34 (emphasis added). "The contention that an injury can amount to a crime only when inflicted by intention is no provincial or transient notion." *Morissette*, 342 U.S. at 250. Yet, the Ninth Circuit has turned this fundamental tenet of criminal law inside out.

Here, defendants could not have obtained fair warning of the legal status of the conduct now resulting in criminal liability. Until today, industry had recognized that materials containing the six historically regulated fibers of asbestos were the subject of potential civil or criminal enforcement if certain practices were not followed. Critically, however, winchite and richterite fell outside this

definition of "asbestos," as used by every governmental regulatory agency to address the issue for decades, the EPA included.[8] This presents an unworkable dilemma. To avoid the fate of W.R. Grace and its employees, the regulated community in the Ninth Circuit must divert resources from business interests to invest in over-compliance with the law. The uncertainty about the legal rule requires a margin of error to avoid inadvertent criminal liability.

It is therefore vitally important that this Court grant review to restore clear notice of the acts that could subject companies and individuals to criminal sanction, so as not to deter economically and socially beneficial activities. *See United States v. United States Gypsum Co.*, 438 U.S. 422, 441 (1978) ("salutary and procompetitive conduct lying close to the borderline of impermissible conduct might be shunned by businessmen who chose to be excessively cautious in the face of uncertainty regarding possible exposure to criminal

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[8] This holds for both civil and criminal enforcement. The Ninth Circuit's understanding of the CAA's "hazardous air pollutant" regulation promulgated for asbestos as an instrument of civil enforcement only is erroneous. It belies the federal government's 30 years of use in criminal prosecutions of the same six-fiber definition of asbestos found in the National Emission Standards for Hazardous Air Pollutants (NESHAP) regulations. Under the Ninth Circuit's decision, however, if prosecutors also assert "imminent endangerment," common law principles can lead to a more expansive allegation-specific definition at variance with the NESHAP text. The result will be inconsistent federal criminal definitions of asbestos in the *same* CAA regulation for substantially similar releases depending on an accident of geography.

punishment for even a good-faith error of judgment").

D. The Ninth Circuit's Erroneous Interpretation Of § 3288's Plain Text Destroys Statutory Repose For Criminal Defendants And Merits Certiorari Review.

The Ninth Circuit's erosion of procedural protections for those accused of regulatory crimes is further exacerbated by its move to substantially weaken criminal statutes of limitations. This Court's review is necessary to protect those accused of regulatory crimes – already burdened by the Ninth Circuit's unprecedented retreat from basic tenets of criminal law – from untimely prosecutions.

The Ninth Circuit fundamentally misunderstood the intent of 18 U.S.C. § 3288, the final sentence of which explains that the savings clause does not extend to initial indictments barred by the statute of limitations. Here, the Ninth Circuit held that this provision does not bar the return of the superseding indictment because the original indictment had been obtained before the statute of limitations expired. Such a reading ignores the district court's unambiguous finding that the initial indictment was "time-barred" because it "failed to allege an overt act in furtherance of the knowing endangerment object within the limitations period." App. (No. 07-1287), at 103a.

By creating an artificial distinction between "time-barred" and "timely-filed," the Ninth Circuit effectively wrote the limitation out of the statute

for these defendants. But the district court never found, and the parties never agreed, that the original indictment had been "timely filed." Nor did the superseding indictment simply repair a minor pleading flaw in an otherwise timely-filed indictment. Section 3288 makes no provision for new allegations in a superseding indictment to relate back to the initial filing date.

Rather, the district court dismissed the initial indictment explicitly on statute of limitations grounds, and the plain text of § 3288 clearly directs that statute of limitations violations in the original indictment cannot be revived under the savings clause. The rationale for this is obvious – were it otherwise, the government could rescue a woefully inadequate indictment containing virtually none of the elements of the offense simply by filing a superseding indictment after the statute of limitations had expired. At best, initial indictments would become placeholders, allowing prosecutors to extend their rights as to potential defendants at the close of the limitations period. The savings clause was intended to protect the government from formalism, from minor technical flaws trumping substance. Yet, the Ninth Circuit has transformed this important check into a device for prosecutors to cast wide nets, and avoid the statute, with the hope of sorting it out afterwards. Especially in the context of regulatory crimes, certiorari review is needed to protect an already over-burdened class of defendants from this abuse.

CONCLUSION

For the foregoing reasons, this Court should grant the petitions for certiorari.

Respectfully submitted.

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HENRY A. ESCHENBACH, ET AL.,
Petitioners,

v.

UNITED STATES OF AMERICA,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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INTRODUCTION

On the fundamental issue raised by the individual petitioners, the government's brief in opposition ("U.S. Br.") neither defends the merits of the Ninth Circuit's ruling nor claims that its approach was consistent with the precedents of this Court or the other federal courts of appeals. Though conceding that the Ninth Circuit did "refer to" petitioners' "knowledge of asbestos," U.S. Br. 21, the government does not argue that this was a correct standard, or one that has been accepted by this Court or other courts. Rather, implicitly acknowledging the unprecedented—and erroneous— nature of the Ninth Circuit's approach, the government claims that the Ninth Circuit's remarks were merely "dictum." U.S. Br. 22. But even a cursory review of the Ninth Circuit's opinion shows that the panel relied heavily on the petitioner's supposed subjective knowledge of "asbestos." This unprecedented use of subjective intent to assess the notice provided by a statute—exacerbated by the utter lack of evidentiary foundation for the panel's speculation—is a dramatic and far-reaching departure from precedent that requires this Court's immediate review.

As discussed thoroughly in W.R. Grace's reply, in which the individual petitioners join, the government's other reasons for denying the petitions are insubstantial, and sometimes border on the disingenuous. Contrary to the government's primary argument, the interlocutory posture of this petition provides no basis for denying review. The issue presented in this petition is dispositive of the substantive Clear Air Act ("CAA") charges and the

CAA object of the conspiracy alleged in the indictment. A pretrial decision affirming the district court's definition of "asbestos" would therefore substantially shorten the trial.

Considerations of fairness, effective judicial review, and conservation of judicial resources all favor prompt review. The individual petitioners are all more than 68 years old and have been under indictment for more than three years. The government has estimated that its case-in-chief will include more than 230 witnesses and almost 750 exhibits. There is no reason that these aging petitioners should face a long and unnecessary trial under a manifestly erroneous legal standard. The CAA charges that depend on this ruling also carry the risk of substantial cross-over prejudice. Moreover, if the petitioners were to prevail at trial, the Ninth Circuit's erroneous ruling would escape this Court's review. Finally, having initiated this interlocutory appeal, the government cannot credibly complain about additional delay that may result from the orderly conclusion of that process.

Certiorari is also warranted to correct the Ninth Circuit's distorted reading of 18 U.S.C. § 3288. The plain language of § 3288 articulates Congress's intent in affording prosecutors the ability to correct flaws in an indictment except where a charge—here, the conspiracy's knowing endangerment object—was not brought within the applicable statute of limitations. The fundamental due process protection provided to defendants by the statute of limitations must be respected in the Ninth Circuit, as in other federal courts.

ARGUMENT

1. The government does not seriously defend the Ninth Circuit's use of petitioners' supposed subjective intent in assessing whether the CAA provided fair notice that its definition of "asbestos" includes richterite and winchite. Nor does the government argue that the Ninth Circuit's approach is consistent with the precedents of this Court or other federal courts of appeals. Rather, it dismisses the Ninth Circuit's approach as "dictum," claiming that the Ninth Circuit held that "the statute alone provided fair notice." U.S. Br. 21-22. But this statement appears nowhere in the court's opinion; rather, the Ninth Circuit's holding rests squarely on the petitioners' putative knowledge. Even if the holding were considered to be dictum, it is still, as noted in Grace's reply, "circuit law." *Barapind v. Enomoto*, 400 F.3d 744, 750-51 & n.8 (9th Cir. 2005) (*en banc*). Tellingly, the Ninth Circuit incorporated its reasoning into its specific holding, finding that "[a]sbestos is adequately defined as a term and need not include mineral-by-mineral classifications to provide notice of its hazardous nature, particularly to these knowledgeable defendants." Pet. App. 19a-20a.

The government claims, relying on a subsequent Ninth Circuit panel opinion that recites the fair notice standard applied by other federal courts of appeals, U.S. Br. 22 n.11 (citing *United States v. Approximately 64,695 Pounds of Shark Fins*, 520 F.3d 976, 980 (9th Cir. 2008)), that the law of the Ninth Circuit is consistent with that of other circuits. This argument is wrong. *Shark Fins* was an *in rem* forfeiture action involving no individual

defendants and presenting no issue of a defendant's subjective intent, *see* 520 F.3d at 980-81. The case therefore provides no guidance as to whether, in a case analogous to this one, the Ninth Circuit would persist in looking beyond the core fair notice standard and consider subjective intent. The government has identified no other case in which a federal court of appeals has authorized such an approach in general, let alone on a record devoid of any evidence bearing on that subjective intent. This petition therefore presents a divergence requiring this Court's review.

The government seeks to minimize the extent of the Ninth Circuit's deviation from standard practice (and its unfair impact on the petitioners) by citing cases suggesting, largely in the context of facial challenges rather than actual prosecutions, that a statute need only provide notice to members of a particular specialized community. *See* U.S. Br. 19 (citing cases to argue that "asbestos as defined by the CAS registry has a sufficiently clear meaning in the relevant industry"). In advancing these arguments, the government, like the Ninth Circuit, deviates from this Court's clear directive in *Bouie v. City of Columbia*, 378 U.S. 347, 355 (1964). *Bouie* held that the adequacy of notice provided by a statute depends on its own words, not on the "basis of an ad hoc appraisal of the subjective expectations of particular defendants," and that the relevant question is whether a statute provides fair notice to a person of common intelligence. *Id.* at 355 n.5. The government is effectively using cases that pre-date *Bouie* and/or arose in a different context to advocate precisely the analysis that *Bouie* forbids. This

argument underscores a persistent confusion among practitioners and courts regarding the interplay between *Bouie* and the cited cases, and favors further review.[1]

The government also argues that "the presence of a culpable intent as a necessary element of the offense," U.S. Br. 20, eliminates any fair notice concerns. This argument is not only wrong but begs the very question presented in this petition. The government correctly notes that the CAA charges require proof that the petitioners knowingly released "asbestos" and that they knew the releases would endanger others. *Id.* Proof of such knowledge, however, would have no bearing on whether the statute, by its own terms, provides fair notice of which substances constitute "asbestos." The government's argument confuses the concepts of *mens rea* and fair notice. Assume that the statute and related regulations contained no definition of "asbestos" whatsoever; even a defendant's scientific knowledge that a certain mineral was properly classified as

[1] The government's effort to apply *Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489 (1982), and similar cases to these facts fails. Even if such approach were proper, which it is not in light of this Court's precedents, the government makes no effort to define the relevant industry in this case or to show that the individual petitioners have a place in it. And, unlike in the cases cited by the government, the definition of asbestos inherently involves analysis of such things as chemical composition and whether a substance is fibrous -- two things that require specialized scientific knowledge -- and will always involve a subjective inquiry. This approach, advocated by the government, thus leads inevitably to analysis of the petitioners' subjective knowledge, without any record evidence to support that analysis.

"asbestos" would not save the statute from a fair notice challenge. *See Bouie*, 378 U.S. at 355 n.5 ("The determination whether a criminal statute provides fair warning of its prohibitions must be made on the basis of the statute itself and the other pertinent law . . . .").

2. The government claims that petitioners will face no prejudice if this Court declines further review because the excluded evidence would have been admissible under the district court's original order adopting the EPA definition of "asbestos." U.S. Br. 14. This assertion is incorrect and strikingly inconsistent with both the district court's order and the government's position below. Indeed, if the government believed it could still prove its case despite the district court's ruling, there was no reason for it to have taken this appeal in the first place.

In response to the district court's ruling that it would not allow presentation of "any sampling data that commingles the minerals making up what the government calls 'Libby amphibole,' without differentiating between minerals covered by the Clean Air Act and minerals not covered," Pet. App. 63a, the government has asserted the importance of the excluded evidence in both pre-trial and appellate proceedings. First, the government's certification under 18 U.S.C. § 3731 stated:

> The sampling evidence and analytical results excluded by the district court's August 7 and August 9, 2006 orders are material to the government's required proof that the defendants released or caused the release of

> a hazardous air pollutant, asbestos, conspired to defraud the United States, and obstructed the EPA. Moreover, the foundational requirements for the admission of the government's Clean Air Act evidence established in these orders has the practical effect of excluding much of the government's evidence relevant to the crimes charged in the Superseding Indictment.

See CR-05-07-M-DWM Dkt. No. 731 at 2 (D. Mont. Aug. 23, 2006) (footnote omitted). In its oral argument before the Ninth Circuit, the government similarly acknowledged that the district court's ruling would prevent it "from presenting facts and data that came from . . . EPA's asbestos sampling in Libby . . . ." Andrew Schneider, *Big Asbestos Prosecution in Jeopardy, U.S. Argues*, Seattle Post Intelligencer, June 5, 2007, *available at* http://seattlepi.nwsource.com/local/318479_grace05.html. The government's current assertion also conflicts with the district court's observation that its rulings "will likely render inadmissible much of the government's proof relating to the Clean Air Act allegations." *United States v. W.R. Grace*, 455 F. Supp. 2d 1133, 1140 n.3 (D. Mont. 2006).

The excluded evidence is dispositive not only of the three counts (out of seven) that relate to the CAA, but also likely the conspiracy count insofar as proof of the CAA object depends on the same evidence. Despite the government's present assertions to the contrary, this evidence is of the utmost importance to the government's case and a

reversal of the Ninth Circuit's decision would dramatically alter the composition of this case.

3. As explained in the individuals' petition, Pet. 31-38, certiorari is also warranted to review the Ninth Circuit's incorrect and pernicious misreading of § 3288. The government's arguments to the contrary are unpersuasive.

In particular, the government ignores the critical flaw in the Ninth Circuit's ruling: under its interpretation of § 3288, the government can bring an untimely indictment—that is, one that does not allege that the defendants committed the crimes for which they are indicted within the relevant statute of limitations—suffer dismissal on that ground, and then use the six-month grace period afforded by § 3288 to resuscitate the prosecution by identifying and alleging an act within the original limitations period. As a practical matter, under this analysis, § 3288 would never preclude the government from filing a superseding indictment in a conspiracy case if the original indictment was dismissed on statute-of-limitations grounds. But that result directly contradicts the plain language of § 3288—which specifies that "[§ 3288] does not permit the filing of a new indictment . . . where the reason for the dismissal [of the original indictment] was the failure to file the [original] indictment . . . within the period prescribed by the applicable statute of limitations"—and would render that provision a nullity. Critically, the government never explains when this clause might have any effect were it not to apply in the context of this case.

Rather than addressing this fundamental point, the government principally adopts the Ninth Circuit's novel and unsupportable distinction between a claim that is "time-barred" because the government failed to allege an overt act within the statute-of-limitations period, and a claim that is not timely filed. *See* U.S. Br. 23 (calling the flaw in the initial indictment a "pleading deficiency"). But that meaningless distinction merely obscures the true error below.[2] *See* Pet. 32-33. A claim is barred by a statute of limitations if the government has not alleged that the defendant committed that crime (in the context of a conspiracy claim, an overt act in support of the conspiracy) within the relevant time period. That was precisely the flaw with the initial indictment here. The mere fact that the government might have been able to obtain an indictment alleging a timely claim when it obtained the initial indictment does not remedy its failure to do so. Because it did not, the plain text of § 3288 precludes the government from getting another bite at the apple.

Thus, should the opinion below stand, criminal defendants in the Ninth Circuit will be stripped of a fundamental due process safeguard. *See Toussie v. United States*, 397 U.S. 112, 114-115 (1970).

4. Because the government has no response to the substantive issues raised by petitioners, it relies

[2] Contrary to the government's assertion, U.S. Br. 23 (citing F.E.R. 549), the district court did not hold that this claim was timely filed. The government has quoted what appears to have been a question from the district court at oral argument and suggested this was the court's ruling.

heavily on its claim that interlocutory review is inappropriate. The government argues that this Court should deny this petition to permit eventual review on a complete record and avoid further delay. Neither of these assertions is meritorious. This Court has emphasized that "there is no absolute bar to review of nonfinal judgments of the lower federal courts." *Mazurek v. Armstrong*, 520 U.S. 968, 975 (1997) (per curiam) (citing *Estelle v. Gamble*, 429 U.S. 97, 98 (1976); *United States v. Gen. Motors Corp.*, 323 U.S. 373, 377 (1945)). This Court has granted review of criminal cases prior to trial. *See, e.g., Sabri v. United States*, 541 U.S. 600 (2004) (deciding criminal case in this posture over the Government's opposition).

Because the questions presented in this petition are dispositive of several counts in the indictment, a decision affirming the district court's construction of the statute would substantially narrow the scope and shorten the length of trial. As the Ninth Circuit noted in its recent *en banc* decision addressing the government's first interlocutory appeal, the complexity of this "case poses special challenges to the parties in preparing for trial and to the court in managing the litigation." *United States v. W.R. Grace*, No. 06-30192, 2008 U.S. App. LEXIS 10453, at *38 (9th Cir. May 15, 2008) (*en banc*). By granting review and clarifying the proper definition of "asbestos" before trial, this Court will promote judicial economy and reduce the burden of trial on the individual petitioners, all of whom are over 68 years of age, as well as on prospective witnesses. The government's desire to have witnesses and victims observe the trial cannot trump the aging

petitioners' right not to stand trial, especially a trial of this magnitude, on patently flawed charges. The government's concerns about delay do not ring true, as the government set the delay in motion by filing an interlocutory appeal in the first instance.

If the petitioners proceed to trial now and prevail, the Ninth Circuit's erroneous reasoning will escape this Court's review and remain the law governing all parties subject to its jurisdiction.

CONCLUSION

For the foregoing reasons, this Court should either summarily reverse the decision below or set the case for plenary review.

Respectfully submitted,

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Petitioner,
v.
UNITED STATES,
Respondent.

HENRY A. ESCHENBACH, ET AL.,
Petitioners,
v.
UNITED STATES,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS, NATIONAL ASSOCIATION OF MANUFACTURERS, AND AMERICAN CHEMISTRY COUNCIL AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

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Other Authorities

AMERICAN BAR ASS'N, THE FEDERALIZATION OF CRIMINAL LAW (1998) 13, 14, 15

Anderson, *The Environmental Revolution at Twenty-Five*, 26 RUTGERS L.J. 395 (1995) 18

Baker, *Measuring the Explosive Growth of Federal Crime Legislation*, THE FEDERALIST SOC'Y FOR LAW & PUBLIC POLICY STUDIES (2005) 14

Barker, *Environmental Crimes, Prosecutorial Discretion, and the Civil/Criminal Line*, 88 VA. L. REV. 1387 (2002) 19

Barkow, *The Ascent of the Administrative State and the Demise of Mercy*, 121 HARV. L. REV. 1332 (2008) 13

Barstow & Bergman, *With Little Fanfare, a New Effort to Prosecute Employers that Flout Safety Laws*, N.Y. TIMES, May 2, 2005 7

BLACK'S LAW DICTIONARY (8th ed. 2004) 16

Coffee, *Paradigms Lost: The Blurring of the Criminal and Civil Law Models*, 71 YALE L.J. 1875 (1992) 14

Fact Sheet: President's Corporate Task Force Marks Five Years of Ensuring Corporate Integrity, U.S. Dep't of Justice (July 17, 2007) 7

Huff, *Wrongful Conviction: Causes and Public Policy Issues*, CRIM. JUST., Spring 2003 8

Lazarus, *Meeting the Demands of Integration in the Evolution of Environmental Law: Reforming Environmental Criminal Law*, 83 GEO. L.J. 2407 (1995) 12, 17, 18, 20, 21

Luna, *The Overcriminalization Phenomenon*, 54 AM. U. L. REV. 703 (2005) 8, 15

Lundin, *Sentencing Trends in Environmental Law: An "Informed" Public Response*, 5 FORDHAM ENVTL. L.J. 43 (1993) 7, 14

Rosenzweig, The Heritage Foundation, *The Over-Criminalization of Social and Economic Conduct* (April 17, 2003) 13, 16, 19, 22

Scott & Stuntz, *Plea Bargaining as Contract*, 101 YALE L.J. 1909 (1992) 8

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BRIEF OF THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS, NATIONAL ASSOCIATION OF MANUFACTURERS, AND AMERICAN CHEMISTRY COUNCIL AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

INTEREST OF THE *AMICI CURIAE*

The National Association of Criminal Defense Lawyers (NACDL) is a non-profit organization with direct national membership of over 10,000 attorneys, in addition to more than 28,000 affiliate members from all 50 states. NACDL is the only professional bar association that represents public defenders and private criminal defense lawyers at the national level. NACDL's mission is to ensure justice and due process for the accused; to foster the integrity, independence, and expertise of the criminal defense profession; and to promote the proper and fair administration of justice. NACDL routinely files *amicus curiae* briefs in this Court and other courts throughout the country.[1]

The National Association of Manufacturers (NAM) is the nation's largest industrial trade association, representing small and large manufacturers in every industrial sector and in all

---

[1] The parties have consented to the filing of this brief. Counsel of record for all parties received notice at least 10 days prior to the due date of the *amici curiae*'s intention to file this brief. No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No persons other than *amici curiae*, its members, or its counsel made a monetary contribution to its preparation or submission.

50 states. The NAM's mission is to enhance the competitiveness of manufacturers by shaping a legislative and regulatory environment conducive to economic growth and to increase understanding among policymakers, the media, and the general public about the vital role of manufacturing to American's economic future and living standards.

The American Chemistry Council (ACC) represents the leading companies engaged in the business of chemistry. ACC members apply the science of chemistry to create innovative products and services that make people's lives better, healthier, and safer. The business of chemistry is a $664 billion enterprise and a key element of the nation's economy. Safety and security have always been primary concerns of ACC members, and they work closely with government agencies to improve security and defend against any threat to the nation's infrastructure.

INTRODUCTION AND SUMMARY OF ARGUMENT

1. The federal government indicted petitioners W.R. Grace and certain of its employees for violating the Clean Air Act (CAA) by releasing a substance constituting or comprising "asbestos" into the ambient air. Petitioners argued, and the district court agreed, that this substance did not qualify as a "hazardous air pollutant" under Environmental Protection Agency (EPA) definitions applicable to both the civil regulatory scheme and, by incorporation, the criminal enforcement provisions. The Ninth Circuit reversed, holding that the term "asbestos" describes something

different – *and far broader* – in a CAA criminal prosecution than the EPA's long-standing definition of the same term. In so holding, the Ninth Circuit committed two significant errors, each meriting review.

First, the Ninth Circuit's decision all but ensures that corporate defendants or indicted employees will receive substantially harsher treatment than their counterparts in other Circuits for the same offense. In the Ninth Circuit, smart prosecutors will now indict, try, and convict – or, more likely, use newfound leverage to secure pleas from – defendants for actions not proscribed by the plain text of any regulation. Actual ignorance of the regulatory prohibition, however vague, will not be a defense. Neither fair notice requirements nor the rule of lenity will apply. Rather, for defendants generally familiar with the regulated substance, activity, or industry, culpable knowledge of the previously unannounced line between legal and illegal conduct will simply be presumed.

The questions presented in this case reach fundamental tenets of criminal enforcement and civil regulation, including:

- due process demands fair notice of the threshold dividing prohibited from permitted conduct;
- courts construing criminal statutes must resolve ambiguities in favor of defendants (i.e., the rule of lenity);

- common law principles cannot enlarge the scope of criminal liability fixed by statute;
- statutes or regulations must mean what they say and must not change based on the identity or characteristics of particular defendants; and
- all accused persons must be treated equally without stereotype, bias, or regard for the accident of geography.

The Ninth Circuit has broken from these venerable principles, subjecting regulated communities to disparate (and virtually unlimited) risk of criminal liability for public welfare offenses. This will have a staggering impact on American industry.

Specifically, and second, the Ninth Circuit's decision jeopardizes the viability of numerous highly-regulated industries already heavily burdened by federal criminal oversight. By collapsing the bright line between legal and illegal conduct and reducing the quantum of criminal intent the government must prove to secure a conviction, the Ninth Circuit has invited inefficient over-investment in regulatory compliance beyond that which the law actually requires. To avoid harsh criminal penalties for inadvertent transgressions of indeterminate standards – the *mens rea* historically reserved for amelioration in tort – companies will now spend far more on prevention than Congress or the EPA ever

intended, reducing competitiveness, and, ultimately, competition, in the affected industries.

This Court's review is thus necessary to restore the few fundamental protections criminal defendants accused of environmental violations had before the Ninth Circuit ran roughshod over them.

2. The Ninth Circuit's decision merits certiorari review for another reason, as well: it substantially weakens protections against untimely prosecutions for those accused of regulatory crimes – a class of defendants already burdened by the Ninth Circuit's retreat from basic tenets of criminal law.

The Ninth Circuit ignored district court's unambiguous finding that the initial indictment violated the statute of limitations because it "failed to allege an overt act in furtherance of the knowing endangerment object within the limitations period." By holding that 18 U.S.C. § 3288 does not bar the return of a superseding indictment where the original indictment was, as here, "time-barred," the decision misunderstands § 3288 to create a distinction between "time-barred" and "timely-filed," effectively writing the limitation out of the statute for these defendants. As a result, prosecutors in the Ninth Circuit may now bring numerous prophylactic indictments alleging generic elements against anyone under suspicion, effectively extending the statutory period by six months in every case.

ARGUMENT

A. Public Welfare Offenses Subject Regulated Communities In The Ninth Circuit To Boundless Risk Of Disparate Penalties Without Traditional Protections.

1. The public welfare offense doctrine – under which individuals can be found guilty with a reduced *mens rea* requirement for handling "dangerous and deleterious devices" that "will be assumed to alert an individual that he stands in responsible relation to a public danger" – "almost uniformly involved statutes that provided for only light penalties such as fines or short jail sentences, not imprisonment in the state penitentiary." *Staples v. United States*, 511 U.S. 600, 612 n.6, 616 (1994); *accord Morissette v. United States*, 342 U.S. 246, 256 (1952) (public welfare offense "penalties commonly are relatively small, and conviction does no grave damage to an offender's reputation"). Under environmental statutes like the CAA and the Federal Sentencing Guidelines, however, companies and individuals who transgress an environmental regulation – even unknowingly – may be guilty of a felony punishable by years of imprisonment. For example, a defendant in an earlier Ninth Circuit case received 33 months imprisonment for discharging 6% more sewage than his permit allowed. *United States v. Weitzenhoff*, 35 F.3d 1275, 1282, 1296 (9th Cir. 1993).

Despite the availability of a wide range of civil and administrative enforcement mechanisms, federal regulators are increasingly turning to

criminal prosecution of the environmental laws.[2] *See* Lundin, *Sentencing Trends in Environmental Law: An "Informed" Public Response*, 5 FORDHAM ENVTL. L.J. 43, 48-51 (1993) (describing trend toward increased environmental prosecutions and longer prison sentences). This trend shows no sign of abating – in fact, the government has recently expanded the reach of environmental enforcement into the workplace. *See* Barstow & Bergman, *With Little Fanfare, a New Effort to Prosecute Employers that Flout Safety Laws*, N.Y. TIMES, May 2, 2005, at A17 (DOJ announcing interagency partnership with EPA and OSHA to prosecute workplace safety violations by using environmental laws).

2. These harsh penalties mixed with the government's decreased burden of proving *mens rea*, as detailed *infra* at 15-22, create immense pressure on defendants to accept plea bargains. The easier a case is to try, the more power a prosecutor wields in plea negotiations: "[c]ases that would be risky in litigation if the crime were defined precisely become fairly easy, meaning that charges the defendant would otherwise contest turn into pleas." Stuntz, *Substance, Process, and the*

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[2] This phenomenon is not limited to environmental laws. Government officials have also stepped up prosecutions for corporate fraud. In 2007, for example, the President's Corporate Fraud Task Force announced its "remarkable results": in five years, it had secured convictions for 1,236 individuals, including 214 CEOs and presidents, 53 CFOs, 23 corporate counsels, and 129 vice-presidents. Fact Sheet: President's Corporate Task Force Marks Five Years of Ensuring Corporate Integrity, U.S. Dep't of Justice (July 17, 2007), *available at* http://www.usdoj.gov/opa/pr/2007/July/07_odag_507.html.

Civil-Criminal Line, 7 J. CONTEMP. LEGAL ISSUES 1, 15 (1996); *see also* Luna, *The Overcriminalization Phenomenon*, 54 AM. U. L. REV. 703, 724 (2005) (increasing potential punishment allows prosecutors "to wield a bigger stick throughout the criminal process, and often leaves the accused little choice but to accept a plea bargain").[3] The more power a prosecutor has to induce a plea agreement, the more concentrated governmental authority becomes because, as commentators have observed, plea bargaining "*is* the criminal justice system." Scott & Stuntz, *Plea Bargaining as Contract*, 101 YALE L.J. 1909, 1912 (1992) (emphasis in original); *see also* Wright, *Trial Distortion and the End of Innocence in Federal Criminal Justice*, 154 U. PA. L. REV. 79, 90-91 (2005) (about 95% of federal criminal cases are resolved by guilty pleas).

3. Both before and after a defendant is swept into the criminal system for regulatory violations, the deck is stacked against her. The probability is high that she will receive a multi-year prison sentence, even if she did not know her actions violated the law and, after the Ninth Circuit's decision here, even if she could not have known. The Ninth Circuit's decision turns the existing legal labyrinth into something even more one-sided, effectively eliminating long-standing procedural

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[3] Studies have shown that *innocent* criminal defendants can be more likely to agree to a plea deal. Huff, *Wrongful Conviction: Causes and Public Policy Issues*, CRIM. JUST., Spring 2003, at 15, 17 (in psychological experiment, "innocent 'defendants' were more likely to accept plea bargains when they faced a number of charges or when the probable severity of punishment was great").

protections for those accused of regulatory infractions.

First, the decision nullifies the principle that due process entitles defendants to fair warning of the conduct that can give rise to criminal liability. Many American industries are already subject to pervasive regulation. The governing regulations are often highly technical, and their requirements can be difficult to ascertain, even for experts. But now, in the Ninth Circuit, the government may prosecute companies and their employees for acts that are not even covered by the text of any regulation but are, at most, somehow merely similar in nature.

Second, the decision impermissibly applies common law principles to enlarge the scope of criminal liability fixed by statutory or regulatory text. The meaning of environmental laws must be determinate, not variable according to the whim of prosecutors or the identity of defendants. Here, even a defendant who manages to penetrate thousands of pages of regulations might still be handed an indictment if the government decides, after the fact, that an otherwise on-point civil regulatory definition does not apply to his conduct – even where, as here, the criminal provision incorporates the civil definition rather than providing one of its own.

Instead, the prosecutor can select his own definition, which, in the present case, was the definition of "asbestos" found in the Chemical Abstract Service (CAS), a private database accessible only to paid subscribers. W.R. Grace Pet.

13. Alternatively, a court can, without citation, offer its own definition, previously unknown and unknowable to the defendant. App. (No. 07-1286), at 16a-17a. There is no refuge, nothing to provide actual or constructive notice, even for the most diligent and innocent-minded defendant who is otherwise engaging in socially productive conduct. This gives prosecutors even more power to bring charges and secure convictions, thus increasing the pressure on defendants to negotiate plea agreements.

In the instant case, the Ninth Circuit held that, because defendants are "an industrial chemical company and seven of its top executives" who "are all familiar with asbestos," they had "actual notice" and "have known of the health risks posed by . . . their products." *Id.* at 17a.[4] While a defendant's professional background might have some bearing on whether he should have known that a particular substance was a pollutant subject to regulation, it is wholly irrelevant to a statute's or regulation's definition of *what* a pollutant is. A defendant's background does not change what it is that Congress and the EPA *intended to – and actually did – regulate.*

"Because construction of a criminal statute must be guided by the need for fair warning, it is rare that legislative history or statutory policies will support a construction of a statute broader than that clearly warranted by the text." *Crandon v.*

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[4] Because there is no factual record in this case – only an indictment – the Ninth Circuit had no basis for making these assumptions about defendants.

United States, 494 U.S. 152, 160 (1990); *see also United States v. Lanier*, 520 U.S. 259, 266 (1997) ("due process bars courts from applying a novel construction of a criminal statute to conduct that neither the statute nor any prior judicial decision has fairly disclosed to be within its scope"). It should be rarer still for a court's own conception of what constitutes a "hazardous air pollutant" to displace, and broaden, the EPA's own published and properly promulgated definition. Nevertheless, the Ninth Circuit has accomplished just that, and in so doing countenanced virtually boundless liability for regulatory crimes.

Third, the Ninth Circuit has abandoned the rule of lenity, the application of which should not hinge on a defendant's subjective characteristics. *See* App. (No. 07-1286), at 17a. When a criminal statute does not, as here, unambiguously cover the accused's conduct, the rule of lenity gives the benefit of the doubt to the defendant. It is a "time-honored interpretive guideline" that "ensures that criminal statutes will provide fair warning concerning conduct rendered illegal and strikes the appropriate balance between the legislature, the prosecutor, and the court in defining criminal liability." *Liparota v. United States*, 471 U.S. 419, 427 (1985). A statute is either ambiguous or it is not – neither the clarity of Congress' intent nor its words in a criminal statute change from defendant to defendant.

"In our era of multiplying new federal crimes" – and, one might add, ever growing and complex regulations – "there is more reason than ever to

give this ancient canon of construction consistent application." *Bryan v. United States*, 524 U.S. 184, 205 (1998) (Scalia, J., dissenting). This is especially true for environmental crimes: "when the environmental protection requirements upon which . . . violations are based are too obscure or indeterminate[,] the applicable law should be read in a light more favorable to the criminal defendant." Lazarus, *Meeting the Demands of Integration in the Evolution of Environmental Law: Reforming Environmental Criminal Law*, 83 GEO. L.J. 2407, 2526 (1995). Indeed, "the problems intended to be redressed by the rule of lenity are especially pronounced in the environmental law context." *Id.* at 2527. In contrast to the Ninth Circuit, other courts of appeals have properly recognized that "[t]he fact that [a] case involves pollution does not make the rule of lenity inapplicable." *United States v. Borowski*, 977 F.2d 27, 32 n.9 (1st Cir. 1992) (applying rule of lenity to Clean Water Act); *accord United States v. Plaza Health Labs., Inc.*, 3 F.3d 643, 649 (2d Cir. 1993).

B. Industries Are Subject To Vast Statutory And Regulatory Schemes, Many Of Which Create Potential Criminal Liability.

The scope of American industry already subject to highly intrusive federal civil regulation and direct criminal enforcement is breathtaking. There are now "several hundred federal agencies, charged with everything from 'assur[ing] so far as possible every working man and woman in the nation safe and healthful working conditions and preserv[ing] our human resources' to creating 'a national policy

which will encourage productive and enjoyable harmony between man and his environment.'" Barkow, *The Ascent of the Administrative State and the Demise of Mercy*, 121 HARV. L. REV. 1332, 1337-38 (2008) (quoting 29 U.S.C. § 651(b) (OSHA) and 42 U.S.C. § 4321 (EPA)). These agencies manage industries comprising a vital share of our domestic economy, including manufacturing, transportation and shipping, finance and banking, energy and mining, health care, pharmaceuticals, agriculture, and more.

The long arm and stubborn complexity of this civil regulatory scheme may be matched only by the rapidly expanding reach of federal criminal laws to new regulatory domains, a mode of enforcement traditionally reserved to the States. No precise count of the number of federal statutory crimes exists. Charged with the task of enumerating them, the American Bar Association's Task Force on the Federalization of Crime essentially gave up, stating that it "may be impossible to determine exactly how many federal crimes could be prosecuted" – "[s]o large is the present body of federal criminal law that there is no conveniently accessible, complete list of federal crimes." AMERICAN BAR ASS'N, THE FEDERALIZATION OF CRIMINAL LAW 2, 9 (1998) (hereinafter "ABA Task Force"). These laws are "scattered in over 50 titles of the United States Code, encompassing roughly 27,000 pages." Rosenzweig, The Heritage Foundation, *The Over-Criminalization of Social and Economic Conduct* (April 17, 2003), *republished in* CHAMPION, Aug. 2003, at *29.

Nevertheless, it is safe to say that thousands of acts (or omissions) are subject to criminal sanction by the federal government – and that number is growing. After an exhaustive analysis, one commentator concluded that "[t]here are *over 4,000 offenses* that carry criminal penalties in the United States Code." Baker, *Measuring the Explosive Growth of Federal Crime Legislation*, THE FEDERALIST SOC'Y FOR LAW & PUBLIC POLICY STUDIES, at 3 (2005) (emphasis added). That number reflects a one-third increase since 1980. *Id.* Environmental crimes accounted for a "substantial number" of the federal criminal statutes enacted from 1998 to 2005. *Id.* Indeed, prior to the 1980s, all but the most egregious environmental violations received administrative or civil sanction. *See* Lundin, *supra*, at 48.

Such figures do not even include administrative regulations. Federal criminal laws impacting economic activity often incorporate regulations promulgated by the agencies charged with implementing the statutes and impose criminal liability for violating the same. The ABA Task Force estimated that as of 1996, the federal government could impose sanctions, many of which would be criminal, for nearly 10,000 regulations – and that is likely a conservative figure. ABA Task Force, *supra*, at 10; *see also* Coffee, *Paradigms Lost: The Blurring of the Criminal and Civil Law Models*, 71 YALE L.J. 1875, 1881 (1992) (early 1990s estimate that "the number of federal regulations currently punishable by criminal penalties [is] over 300,000"). "Whatever the exact number of crimes that comprise today's 'federal criminal law,' it is

clear that the amount of individual citizen behavior now potentially subject to federal criminal control has increased in astonishing proportions in the last few decades." ABA Task Force, *supra*, at 10.

C. A Relaxed *Mens Rea* Requirement Leaves Regulated Communities Vulnerable To Prosecution And Invites Inefficient Over-Investment in Compliance.

The convergence of the federal government's civil regulatory role with its vast expansion into the criminal sphere has already harmed regulated communities. "[The] rise of the modern administrative state [has] erect[ed] a vast legal labyrinth buttressed by criminal penalties in areas ranging from environmental protection and securities regulation to product and workplace safety." Luna, *supra*, at 708-09.

That twin enforcement system captures acts (or omissions) that may not be inherently evil and which, to the contrary, frequently occur in the context of socially and economically beneficial activities. Proof that the defendant knew she was violating the law is rarely required; a mere inadvertence can sometimes result in a felony conviction. Thus, coupled with the sheer volume of regulations – many of which are, at best, incredibly complex – the cost of compliance is high. Yet, the cost has thus far been determinate; what any given law required was usually ascertainable. No longer in the Ninth Circuit. Its decision here allows prosecutors to impute knowledge of illegality to defendants before the illegal subject matter is even

identified, increasing the burden of compliance to the breaking point.

1. Acts giving rise to regulatory criminal liability are unlike traditional, common law crimes. They are wrongful not because of their intrinsic nature – like murder, arson, or rape (*malum in se*) – but rather because the law says they are (*malum prohibitum*). BLACK'S LAW DICTIONARY 978-79 (8th ed. 2004) (*malum prohibitum* is "a[n] act that is a crime merely because it is prohibited by statute, although the act itself is not necessarily immoral"). Thus, "many statutes punish those whose acts are wrongful only by virtue of legislative" – or agency – "determination." Rosenzweig, *supra*, at *30. As a result, individuals are less likely to realize when their actions cross the line from permissible to criminal. This is especially true when the laws are technical and complex.

For example, this Court has observed that the "highly technical" tax code and banking laws "present[] the danger of ensnaring individuals engaged in apparently innocent conduct." *Bryan*, 524 U.S. at 194. Both sets of laws "sometimes criminalize conduct that would not strike an ordinary citizen as immoral or likely unlawful. Thus, both sets of laws may lead to the unfair result of criminally prosecuting individuals who subjectively and honestly believe they have not acted criminally." *United States v. Aversa*, 984 F.2d 493, 502 (1st Cir. 1993) (en banc) (Breyer, J., concurring); *see also Arthur Anderson LLP v. United States*, 544 U.S. 696, 703-04 (2005) ("the act underlying the conviction – 'persuasion' – is by

itself innocuous . . . 'persuading' a person 'with intent to . . . cause' that person to 'withhold' testimony or documents from . . . Government official[s] is not inherently malign") (quoting 18 U.S.C. § 1512(b)); *Ratzlaf v. United States*, 510 U.S. 135, 144 (1994) ("currency structuring is not inevitably nefarious").

These concerns are magnified in the environmental realm, particularly because environmental laws are frequently empirical. Because "[t]here are rarely any clear threshold levels at which environmental pollution becomes unacceptable," the laws "draw[] lines that tend to be based on fairly arbitrary distinctions [and] turn on questions of degree that are, at best, gray at the border." Lazarus, *supra*, at 2431. "It is rarely self-evident[] on which side of the border one lies." *Id.* Moreover, because "[m]any socially beneficial activities cause pollution, either indirectly or directly," environmental laws often do not prohibit the release of substances in their entirety; rather, the laws govern "where, when, and how much" one can discharge – "the difference between being on just one side of the line rather than just on the other side is likely to be negligible," but the legal consequences can be tremendous. *Id.* at 2422, 2431.

Not only are the lines between permissible and illegal not intuitive in environmental law, but they are incredibly complex and technical. Even experts in the field refer to environmental law's "extraordinary complexity" and note that "the quantity of minutely detailed language in modern environmental law beggars description." *Id.* at 2423

(collecting citations). "[A]lthough criminal law requires clear, determinate, and readily accessible legal standards, familiar to the general public, environmental law is replete with obscure . . . and highly technical standards, the meaning of which few can claim genuine mastery." *Id.* at 2445.

2. There are approximately 16,000 pages of regulations for the three major environmental statutes – the Clean Air Act, Clean Water Act (CWA), and Resource Conservation and Recovery Act (RCRA). *See* 40 C.F.R. §§ 50-97 (CAA); 40 C.F.R. §§ 100-149, 400-699 (CWA); 40 C.F.R. §§ 260-282 (RCRA). *See also* Anderson, *The Environmental Revolution at Twenty-Five*, 26 RUTGERS L.J. 395, 413 (1995) (environmental regulations in Code of Federal Regulations measure over thee-and-a-half feet tall).[5]

Individuals need not know that their conduct violates *any* of these regulations to be subject to potential criminal liability. The CAA, CWA, and RCRA criminalize almost all knowing violations of a regulation, including discharging a substance without a permit when one is required, failing to comply with a permit condition, or failing to meet recording and reporting requirements. 42 U.S.C.

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[5] The EPA also drafts preambles to its regulatory schemes that do not appear in the Code of Federal Regulations, but provide detailed guidance as to how the agency plans to implement specific laws. These preambles can be lengthier than the rules themselves. For example, the regulations setting forth the definition of "solid waste" were a few pages of the Federal Register; the EPA's preamble explaining those regulations covered 54 pages. Lazarus, *supra*, at 2437 (citing 50 Fed. Reg. 614 (1985)).

§ 7413(c)(1)-(2); 33 U.S.C. § 1319(c)(2); 42 U.S.C. § 6928(d). To determine the scope of criminal liability, one must not only consult the statute, but also decipher the underlying regulations that form the basis for the statute's civil regulatory scheme. "This structure creates [a] broad criminal net, which piggybacks on the full range of environmental regulations." Barker, *Environmental Crimes, Prosecutorial Discretion, and the Civil/Criminal Line*, 88 VA. L. REV. 1387, 1393 (2002); *see also* Rosenzweig, *supra*, at *35 ("Identically phrased statutes are often applicable to the same conduct – one authorizing a civil penalty and the other a criminal sanction.") (citing 33 U.S.C. § 1319(g) (authorizing administrative penalties for CWA violations), § 1319(b),(d) (civil penalties), and § 1319(c) (criminal penalties)).

The requirement that a violation be "knowing" is all that stands between a civil or administrative sanction and a felony conviction. As one commentator has noted, however, that line is a "parchment barrier," Rosenzweig, *supra*, at *33, because courts of appeals have held that a "knowing" *mens rea* does not require that the defendant actually know he is breaking the law. Put another way, the "knowing" *mens rea* standard in environmental statutes "requires not that a defendant know that his conduct was illegal, but only that he know the facts that make his conduct illegal." *United States v. Wilson*, 133 F.3d 251, 262 (4th Cir. 1997) (quotations omitted). The "government need not prove that the defendants understood the legal consequences of those facts or were even aware of the existence of the law

granting them significance." *Id.* at 264.[6] In other words, to secure a felony conviction, the government need only prove that a defendant knew she was discharging a pollutant. A defendant who honestly, but incorrectly, believed that she – or her employer – had a permit to do so has no defense. *E.g., United States v. Weitzenhoff*, 35 F.3d 1275, 1286 (9th Cir. 1993) (defendants could not interpose "lack of knowledge" defense where permitted sewage discharge exceeded allowable levels by 6%; knowledge of discharge alone satisfied *mens rea* standard);[7] *United States v. Hopkins*, 53 F.3d 533, 541 (2d Cir. 1995) (government needed to prove only that defendant "knew the nature of his acts and performed them intentionally, but [not] that he knew that those acts violated the CWA, or any particular provision of that law, or the regulatory permit").

Similarly, by invoking the traditional public welfare offense doctrine, courts of appeals have also held that a defendant who knowingly discharged a pollutant, but did not know he needed a permit to do so, acted "knowingly." *E.g., United States v.*

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[6] *See also* Lazarus, *supra*, at 2469 ("Without exception, the courts agree that the criminal penalty provisions in [environmental statutes] that require that a person 'knowingly violates' do not require the government to prove that the defendant was actually aware of the applicable environmental standard.").

[7] "The only thing [the defendants] have to know to be guilty is that they were dumping sewage into the ocean, yet that was a lawful activity expressly authorized by their federal permit." *Weitzenhoff*, 35 F.3d at 1294 (Kleinfeld, J., dissenting from denial of rehearing en banc).

Weintraub, 273 F.3d 139, 147 (2d Cir. 2001). For a public welfare offense, a defendant has the requisite *mens rea* if he simply "knows that he is dealing with a dangerous devise of a character that places him in responsible relation to a public danger, [and] should be alerted to the probability of strict regulation." *Staples*, 511 U.S. at 607 (quotations and citation omitted). *See, e.g., United States v. Sinskey*, 119 F.3d 712, 715-16 (8th Cir. 1997) (CWA, invoking public offense doctrine); *Hopkins*, 53 F.3d at 537-39 (same); *Weitzenhoff*, 35 F.3d at 1284-86 (same). Thus, the government need not prove that a defendant knew a substance was covered by a regulation – only that the defendant had a general sense that the substance was a pollutant.

Of course, not all pollutants are self-evidently pollutants as defined by statute or regulation: hot water, rock, and sand are "pollutants" under the CWA. 33 U.S.C. § 1362(6); *see also* Lazarus, *supra*, at 2479 ("pollutants subject to the federal environmental statutes are not . . . confined to those that are especially dangerous"). And, to hold that "any statute can be described as creating a public welfare offense so long as the statute regulates conduct that is known to be subject to extensive regulation and that may involve a risk to the community . . . would extend th[e] narrow [public welfare offense] doctrine to virtually any criminal statute applicable to industrial activities." *Hanousek v. United States*, 528 U.S. 1102, 120 S. Ct. 860, 861 (2000) (Thomas, J., dissenting from denial of certiorari).

In short, an individual can act "knowingly" even without any specific intent to do a wrongful act or to violate a legal duty that is set forth amid thousands of pages of dense, highly technical regulations – regulations that even agency officials might not understand.

3. The Ninth Circuit's interpretation of the CAA's knowing endangerment section relaxes prosecutors' burden of proving intent even further. As the law currently stands, "in regulated industries, those who participate in the industry are presumed to know all of the intricate regulatory arcana that govern their conduct. As a consequence, the only requirement imposed by requiring proof that one has acted 'knowingly' is that the government must demonstrate that the defendant has purposefully done the act constituting the offense – and *in the context of regulated economic conduct that showing is trivial.*" Rosenzweig, *supra*, at *33-*34 (emphasis added). "The contention that an injury can amount to a crime only when inflicted by intention is no provincial or transient notion." *Morissette*, 342 U.S. at 250. Yet, the Ninth Circuit has turned this fundamental tenet of criminal law inside out.

Here, defendants could not have obtained fair warning of the legal status of the conduct now resulting in criminal liability. Until today, industry had recognized that materials containing the six historically regulated fibers of asbestos were the subject of potential civil or criminal enforcement if certain practices were not followed. Critically, however, winchite and richterite fell outside this

definition of "asbestos," as used by every governmental regulatory agency to address the issue for decades, the EPA included.[8] This presents an unworkable dilemma. To avoid the fate of W.R. Grace and its employees, the regulated community in the Ninth Circuit must divert resources from business interests to invest in over-compliance with the law. The uncertainty about the legal rule requires a margin of error to avoid inadvertent criminal liability.

It is therefore vitally important that this Court grant review to restore clear notice of the acts that could subject companies and individuals to criminal sanction, so as not to deter economically and socially beneficial activities. *See United States v. United States Gypsum Co.*, 438 U.S. 422, 441 (1978) ("salutary and procompetitive conduct lying close to the borderline of impermissible conduct might be shunned by businessmen who chose to be excessively cautious in the face of uncertainty regarding possible exposure to criminal

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[8] This holds for both civil and criminal enforcement. The Ninth Circuit's understanding of the CAA's "hazardous air pollutant" regulation promulgated for asbestos as an instrument of civil enforcement only is erroneous. It belies the federal government's 30 years of use in criminal prosecutions of the same six-fiber definition of asbestos found in the National Emission Standards for Hazardous Air Pollutants (NESHAP) regulations. Under the Ninth Circuit's decision, however, if prosecutors also assert "imminent endangerment," common law principles can lead to a more expansive allegation-specific definition at variance with the NESHAP text. The result will be inconsistent federal criminal definitions of asbestos in the *same* CAA regulation for substantially similar releases depending on an accident of geography.

punishment for even a good-faith error of judgment").

D. The Ninth Circuit's Erroneous Interpretation Of § 3288's Plain Text Destroys Statutory Repose For Criminal Defendants And Merits Certiorari Review.

The Ninth Circuit's erosion of procedural protections for those accused of regulatory crimes is further exacerbated by its move to substantially weaken criminal statutes of limitations. This Court's review is necessary to protect those accused of regulatory crimes – already burdened by the Ninth Circuit's unprecedented retreat from basic tenets of criminal law – from untimely prosecutions.

The Ninth Circuit fundamentally misunderstood the intent of 18 U.S.C. § 3288, the final sentence of which explains that the savings clause does not extend to initial indictments barred by the statute of limitations. Here, the Ninth Circuit held that this provision does not bar the return of the superseding indictment because the original indictment had been obtained before the statute of limitations expired. Such a reading ignores the district court's unambiguous finding that the initial indictment was "time-barred" because it "failed to allege an overt act in furtherance of the knowing endangerment object within the limitations period." App. (No. 07-1287), at 103a.

By creating an artificial distinction between "time-barred" and "timely-filed," the Ninth Circuit effectively wrote the limitation out of the statute

for these defendants. But the district court never found, and the parties never agreed, that the original indictment had been "timely filed." Nor did the superseding indictment simply repair a minor pleading flaw in an otherwise timely-filed indictment. Section 3288 makes no provision for new allegations in a superseding indictment to relate back to the initial filing date.

Rather, the district court dismissed the initial indictment explicitly on statute of limitations grounds, and the plain text of § 3288 clearly directs that statute of limitations violations in the original indictment cannot be revived under the savings clause. The rationale for this is obvious – were it otherwise, the government could rescue a woefully inadequate indictment containing virtually none of the elements of the offense simply by filing a superseding indictment after the statute of limitations had expired. At best, initial indictments would become placeholders, allowing prosecutors to extend their rights as to potential defendants at the close of the limitations period. The savings clause was intended to protect the government from formalism, from minor technical flaws trumping substance. Yet, the Ninth Circuit has transformed this important check into a device for prosecutors to cast wide nets, and avoid the statute, with the hope of sorting it out afterwards. Especially in the context of regulatory crimes, certiorari review is needed to protect an already over-burdened class of defendants from this abuse.

CONCLUSION

For the foregoing reasons, this Court should grant the petitions for certiorari.

Respectfully submitted.

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